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APPENDIX

Supreme Court, U.S.
FILED

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Supreme Court of the United States

October Term, 1970

No. 870

MAGNESIUM CASTING COMPANY,
Petitioner,

- v. -

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 9, 1970

CERTIORARI GRANTED OCTOBER 12, 1970

TABLE OF CONTENTS

	Trans. Page	App. Page
Chronological List of Relevant Docket		
Entries	1	
Excerpts from Transcript of Proceedings	1	3
Thursday, April 4, 1968		
<i>Witnesses:</i>		
Harvey Berman		
—Monday, April 8, 1968		
Direct	33	16
Cross	60	24
Redirect	115	41
Obedia Ford		
Direct	121	43
Cross	124	45
Alonzo Massey		
—Friday, April 12, 1968		
Direct	136	48
Cross	144	52
George Morris		
Direct	170	64
Cross	176	67
Ivory Scott		
—Thursday, April 18, 1968		
Examination (by Hearing Officer)	200	76
Cross	217	86
Cross	221	88
Recross	234	92
Recross	235	93
Further Recross	237	93
Raymond Zagrafos		
Direct	239	94
Cross	257	101

Table of Contents

	Trans.	App.
	Page	Page
Redirect	261	102
Further Examination	265	103
Examination (by Hearing Officer)	276	105
Further Redirect	279	105
 <i>Respondent's Exhibits</i>		
Nos. 1(a) Plating Department Quality Control Daily thru 1(c) Check List, dated March 18, 19, and 25, respectively	107	
Decision and Direction of Election, dated May 22, 1968	110	
Respondent's request for review, dated May 31, 1968	117	
Teletype communication from Howard W. Kleeb, Deputy Ex. Secy., NLRB to Albert J. Hoban, Regional Director, re: Magnesium Casting Co., dated June 18, 1968, denying Respondent's request for review.	127	
Decision of the United States Court of Appeals For the First Circuit vacating interlocutory order of district court, dated September 10, 1968	128	
Supplemental Decision and Certification of Representative, signed by Albert J. Hoban, Director Region 1, dated October 11, 1968	131	
Request for Review, dated October 18, 1968	136	
Teletype communication from Robert Volger, Assoc. Ex. Secy. NLRB, to A. Hoban, Jerome H. Somers & David Wagner, Esqs. denying request for review, dated November 1, 1968	137	
Complaint and Notice of Hearing, dated November 8, 1968	138	
Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases As Taken from the Board's Published Rules and Regulations and Statement of Procedure	142	

Table of Contents

iii

	App. Page
Answer to Complaint, dated November 21, 1968	145
Order to Show Cause on Motion for Summary Judgment, dated December 6, 1968	147
Respondent's Reply to Show Cause Order, dated December 31, 1968	147
Trial Examiner's Decision, dated January 28, 1969	157
Appendix — Notice to All Employees	171
Exceptions to Trial Examiner's Decision dated February 18, 1969	172
Decision and Order, 175 NLRB No. 68, dated April 17, 1969	185
Respondent's Motion for Reconsideration, dated April 29, 1969	186
Order Denying Motion, dated August 11, 1969	190
Respondent's Motion to Reopen Hearing and to Admit Additional Evidence, dated September 25, 1969	192
Order Denying Motion, dated October 22, 1969	194
Board's Application for Enforcement, filed November 12, 1969	196
Respondent's Answer to Petition, filed November 28, 1969	198
Opinion and Decree in National Labor Relations Board v. Magnesium Casting Company, 1 Cir., 427 F.2d 114, issued May 21, 1970	200
Motion to Stay Decree Pending Petition for Writ of Certiorari, filed May 29, 1970	213
Order of Aldrich, Ch. J. staying decree to and including July 10, 1970, dated May 29, 1970	214
Order of Supreme Court of the United States, granting writ of certiorari, dated October 12, 1970	215

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- 3.14.68 Petition filed
- 3.27.68 Notice of representation hearing, dated
- 4. 4.68 Hearing opened
- 4.18.68 Hearing closed
- 5. 7.68 Respondent's motion to correct the record, dated
(Granted, see footnote 1, page 1 of the Decision &
Direction of Election.)
- 5.22.68 Decision and Direction of Election, dated
- 5.31.68 Respondent's request for review, dated
- 6. 7.68 Petitioner's statement in opposition to Respondent's request, received
- 6.17.68 Respondent's motion to withdraw Decision &
Direction of Election and dismiss petition, dated
- 6.18.68 Board's teletype denying Respondent's request,
dated
- 6.19.68 Regional Director's teletype denying Respondent's motion to withdraw Decision and Direction of Election & dismiss petition, dated
- 6.21.68 Notice of Election for
- 6.21.68 Tally of ballots issued
- 6.21.68 Certification on Conduct of Election of
- 6.28.68 Respondent's objections to conduct of election,
dated
- 10.11.68 Regional Director's supplemental Decision and
certification of representative, dated
- 10.19.68 Respondent's teletype, exception to the supplemental Decision and certification of representative, dated

11. 1.68 Board's teletype denying Respondent's request for review of supplemental decision & certification of representative, dated

1-CA-6498

10.23.68 Charge filed
11. 8.68 Complaint & notice of hearing, dated
11.18.68 Respondent's motion for bill of particulars, dated
11.22.68 General Counsel's answer to Respondent's motion, received
12. 3.68 General Counsel's Motion for Summary Judgment, dated
12. 3.68 Regional Director's Order referring motion to the Trial Examiner, dated
12. 4.68 Respondent's answer to complaint & notice of hearing, received
12. 6.68 Trial Examiner's Order to show cause on motion for summary judgment, dated
1. 2.69 Respondent's reply to show cause, received
1.28.69 Trial Examiner's Decision, granting *inter alia* the motion for summary judgment, dated
1.29.69 Addendum to motion for summary judgment, dated
1.29.69 Regional Director's Order referring addendum to motion for summary judgment to the Trial Examiner, dated
3. 3.69 Respondent's exceptions, received
3. 3.69 Charging Party's exceptions, received
4.17.69 Decision and Order issued by the National Labor Relations Board, dated
5. 1.69 Respondent's motion for reconsideration, received
8.11.69 Board's Order deny'g motion, dated
9.26.69 Respondent's motion to reopen hearing and to adduce additional evidence, received

9.30.69 General Counsel's teletype opposing Respondent's motion to reopen the hearing, dated
10. 1.69 Charging Party's teletype opposing Respondent's motion to reopen the hearing, dated
10.22.69 Board's Order denying Respondent's motion, dated
11.12.69 Board's application for enforcement
11.28.69 Respondent's answer to application, filed
5.21.70 Opinion and Decree of U. S. Court of Appeals for the First Circuit, issued
5.29.70 Motion to stay order filed. Order staying decree issued
10.12.70 Order granting certiorari issued

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NUMBER 1-RC-9973

MAGNESIUM CASTING Co.

EMPLOYER

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

PETITIONER

John F. Kennedy Federal Building
Boston, Massachusetts
Room 2007-A

Thursday, April 4, 1968

The above-entitled matter came on for hearing, pursuant to notice, at 1:00 p.m.

Before:

FRANCIS V. PAONE, Hearing Officer.

Appearances:

JEROME H. SOMERS, Esq., Stoneman & Chandler, 79 Milk Street, Boston, Massachusetts, appearing on behalf of the Employer.

WARREN H. PYLE, Esq., Angoff, Goldman, Manning & Pyle, 44 School Street, Boston, Massachusetts, appearing on behalf of the Petitioner.

* * *

[3]

PROCEEDINGS

Hearing Officer Paone: The hearing will be in order. This is a formal hearing in the matter of Magnesium Casting Co., Case No. 1-RC-9973 before the National Labor Relations Board. The Hearing Officer appearing for the National Labor Relations Board is Francis V. Paone.

All parties have been informed of the procedures at formal hearings before the Board by service of statement of standard procedures with notice of hearing. I have additional copies of this statement if any party wishes more.

Will Counsel please state their appearance for the record.

For the Petitioner: Angoff, Goldman, Manning & Pyle by Warren H. Pyle, 44 School Street, Boston, Massachusetts.

For the Employer: Entering a special appearance only to argue against the holding of this hearing and to argue for a postponement, Stoneman & Chandler by Jerome H. Somers, 79 Milk Street, Boston.

Hearing Officer: Are there any other persons, parties or labor organizations in the hearing room at this time who claim an interest in this proceeding? Let the record show no further response.

At this time I propose to receive in evidence as Board's Exhibit [4] No. 1 the following papers in this proceeding which I shall designate for the record as follows: (a), petition for certification of representatives pursuant to Section

9-C of the National Labor Relations Act as amended filed March 14th, 1968 by United Steelworkers of America, AFL-CIO signed by James W. Debok, Staff Representative; (b), notice of representation hearing signed by Albert J. Hoban, Regional Director, Region One, National Labor Relations Board, Boston, Massachusetts, March 27th, 1968; (c) affidavit of service of copy of notice of representation hearing and petition with Form NLRB 4669 attached, signed by Helen L. Brock before Mary D. Ferrari, designated agent, National Labor Relations Board, together with certified mail receipts indicating service on the parties.

Are there any objections to the receipt of these documents in evidence? Mr. Pyle?

Mr. Pyle: No objection.

Hearing Officer: Mr. Somers?

Mr. Somers: I would like to state the position of the Employer at this time prior to making any stipulations or making any statements. As you noted, we are making a special appearance only in this case. It's the position of the Employer that the hearing today should not be held and should be postponed. And the reasons for such are as follows: In the afternoon of March 29th, 1968 a charge was filed by the [5] Employer against United Steelworkers, subsequently docketed as Case No. 1-CB-1362. The charge alleged that certain supervisors acting on behalf of the Union were distributing campaign literature to employees on company time and on company premises and also urging employees at various times both on and off premises to sign Union authorization cards.

The seriousness of the charge I think is very clear not only as to an unfair labor practice as such in the restraint and coercion of employees in the plant, but also going to the showing of interest of the Petitioner in this case. It would not only go strictly to an unfair labor practice charge, but also the substance of this hearing.

The Charging Party at that time did not file a request to proceed because of its feeling that this charge had to be investigated and should have been investigated prior to the holding of any hearing. On April 2nd a letter was received by the Charging Party. This was actually a copy of the letter sent to the charged party. On April 2nd a letter was sent to the Board outlining the specific evidence which the Charging Party wished to present. The investigation has in fact been begun. It has begun.

According to the manual of the National Labor Relations Board under Section 11730 when R cases, representation, and C cases, unfair labor practice—

Mr. Pyle: 117.30?

[6] Mr. Somers: 11730. When concurrent R and C cases are pending, the R case hearing, if it has not been held, is postponed. This is expressed explicitly to be the general policy of the Board.

In fact this is not the policy that is being followed today; and, in fact, the Employer—the Charging Party in the CB case—has received no indication as to why in fact that policy is not being followed.

And in view of this we are making the special appearance, and we do not intend to proceed on the merits or on the substance contained in the R case petition. We are not willing to stipulate to any of the relevant facts, and we are not willing at this time to present any evidence.

Therefore, I move that this hearing be postponed until the investigation of the CB charge has been completed and disposed of one way or another.

Hearing Officer: Mr. Somers, on April 3rd you received a telegram, did you not, signed by Albert J. Hoban, Regional Director, National Labor Relations Board, stating, "Receipt of your letter dated 4/2 requesting postponement of hearing in 1-RC-9973 is acknowledged. Upon consideration thereof, your request is denied."

Mr. Somers: That is correct. We did receive that, no reason being stated in Mr. Hoban's telegram.

[7] Hearing Officer: Did you receive any further communication from the Board?

Mr. Somers: Yes, we received a communication from the National Labor Relations Board from Mr. Kleeb.

Hearing Officer: That communication being namely a Teletype stating, "Re: Magnesium Casting Co., 1-RC-9973. Board will not interfere with Regional Director's decision to proceed with hearing in this case. Although unfair labor practice charges normally block processing of representation cases, the Regional Director may in his discretion elect to proceed with hearing, despite pendency of unfair labor practice charge. Signed Howard W. Kleeb, Deputy Executive Secretary, NLRB, Washington, D. C."

Did you receive that?

Mr. Somers: We received both of those.

Mr. Pyle: Do you mean to say this company went all the way to Washington to try to postpone this hearing?

Mr. Somers: We went to Washington, Mr. Paone, in order that the proper procedures and customary procedures be followed, as they normally are.

* * *

[8] Mr. Somers: We have had many cases and we have represented many people before the Board, and when circumstances such as these arise, whether it be the Union filing the charge or the Employer filing the charge, the customary procedure that has always been followed insofar as our office is knowledgeable is that the representation proceeding is postponed pending determination of the charge. This is the procedure which we expect to be kept; and when this procedure is not followed and no reason is presented therefor, we can see no reason for proceeding with this hearing, and we are entering a special appearance as a result.

* * *

[16] Mr. Somers: If the Board wishes these figures in this hearing and wishes to continue with the procedures that it is following, it will have to subpoena the books and records of the Company for the commercee information.

[17] Mr. Pyle: Will you comply with the subpoena?

Mr. Somers: I say if the Board wishes to follow the procedure which it is presently following by going ahead with the representation proceeding while the C case is pending, then they will have to subpoena the books and records in order to ascertain jurisdiction.

Mr. Pyle: Will your client comply with the subpoena?

Mr. Somers: I have no knowledge whether they will or won't.

Hearing Officer: Do I understand you to say that the information will be furnished only on the basis of a subpoena, Mr. Somers?

Mr. Somers: Insofar as this proceeding is concerned that is correct.

Hearing Officer: Do you have any witnesses here today to give testimony?

Mr. Somers: No, I do not.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: Gentlemen, we will proceed with the hearing; and, prior to the close of the hearing we look forward to receiving the information from the Employer with respect to the business and operations thereof. Mr. Somers, we will proceed with the hearing.

Mr. Somers: I have informed you before of the method of [18] the procedure you will have to follow in order to receive that information concerning the business.

Mr. Pyle: In other words your client will comply with the subpoena.

Mr. Somers: I did not say that. I said you will have to issue a subpoena. I do not know whether they will comply or not.

Mr. Pyle: That is an honest statement, but your prior statement was incorrect. You are not promising anything. You are not telling us anything.

Mr. Somers: I move that the hearing be adjourned until such time as that information is ascertained because I think any other questions with regard to the Employer are premature in view of the fact the Board does not know whether in fact they have jurisdiction over the employer. To get into facts further than that prior to knowing whether they have jurisdiction or not I think is premature.

* * *

[20] Mr. Somers: I haven't been requested to furnish information of commerce by the agent investigating the case.

Hearing Officer: Would you now on request furnish that information?

Mr. Somers: This is part of the charge. This is something that the Board has to ascertain. I don't think that the conduct of the investigation of the CB case is a matter of this hearing.

Hearing Officer: No, I'm not going into any CB facts or factors here.

Mr. Somers: We are willing to proceed in the normal general—

Hearing Officer: I want to know whether your client for whom you filed a CB charge in this office is engaged in commerce within the meaning of the Act with respect to this representation proceeding that is before this Board.

Mr. Somers: Right.

Hearing Officer: That is all I'm asking you. I'm not going to go into the CB case. That will be for the other forum. Now, that's all we are asking at this time. In that connection again would you say that you are not going to furnish that information for the representation proceeding? That's what I'm talking about.

Mr. Somers: I have given you our position as far as fur-

nishing the information in the representation proceeding. [21] Hearing Officer: Namely, that if the information has to be obtained it would have to be obtained through a subpoena.

Mr. Somers: That is correct.

Mr. Pyle: You don't guarantee compliance with the subpoena.

Mr. Somers: I don't know what the Employer will do. All we are asking here, and I repeat this again, is that the proper general policy of the Board be followed and that the CB case be investigated prior to the holding of the representation hearing. That is all that we are asking for here. We are asking the Board to follow the normal procedures and not to make an exception.

* * *

Mr. Somers: Mr. Paone, we filed this charge in all good faith, believing there are violations of employees' rights being engaged in in this plant by people acting for the Union. We don't feel that it is a [22] proper procedure—and to our knowledge we have never seen this procedure followed—whereby the representation hearing is held when there are not only substantial questions of unfair labor practices, but substantial questions going to the showing of interest by the Steelworkers. This charge definitely contains substance which, if proven, definitely would show that the showing of interest is tainted. I can't see—

Hearing Officer: I'm not concerned with the showing of interest in this proceeding. As you well know, Mr. Somers, showing of interest is an administrative matter, and that isn't to be taken up at this proceeding, and it's not litigable here as you well know. I don't have to tell you that, sir.

Mr. Somers: This petition would not stand if there wasn't an administrative determination that the showing of interest was sufficient.

Hearing Officer: That is to be taken up at a different stage.

Mr. Somers: This is evidence going to the administrative decision which I think the Employer should be allowed to present to the Board before it makes the administrative determination.

Hearing Officer: To another forum. Not here.

* * *

[23] Hearing Officer: Again, as I said, I'm going to go forward—

Mr. Somers: I'd like to move that the hearing be adjourned until such time as the jurisdiction is ascertained.

Mr. Pyle: It's already been denied.

Mr. Somers: I haven't heard anything from the Hearing Officer, and I wish you wouldn't interrupt when I'm making remarks.

Hearing Officer: Off the record.

(Discussion off the record.)

Hearing Officer: On the record. The hearing will be in order. The hearing will be in recess until Monday Morning.

* * *

[25]

Hearing Room 2007-A
JFK Federal Building
Boston, Massachusetts

Monday, April 8, 1968

* * *

[26] Mr. Somers: Mr. Paone, we are prepared to proceed, but we do wish to reserve our rights to appeal and object to the conduct of the Board in proceeding with this hearing without the completion of the investigation disposable of the unfair labor practice complaint.

As far as the commerce, we will stipulate that the Employer does purchase in excess of \$50,000 worth of goods from out of the Commonwealth of Massachusetts and does ship in excess of \$50,000 worth of goods outside of the Commonwealth of Massachusetts.

Hearing Officer: And the Employer is a Mass. corporation, Mr. Somers?

Mr. Somers: That is correct.

Hearing Officer: Do you so stipulate on behalf of the [27] Petitioner, Mr. Pyle?

Mr. Pyle: I do.

Hearing Officer: The stipulation is received in evidence.

Mr. Pyle: Could you read back the stipulation please.
(Stipulation read back.)

Mr. Pyle: You mean you ship and receive \$50,000 annually?

Mr. Somers: Yes, that's correct.

Mr. Pyle: Thank you.

Hearing Officer: All right, gentlemen, with respect to the question of representation, the file indicates that on or about March 11, 1968, a request for recognition as the bargaining representative was made to the Employer. Can you tell us, Mr. Somers, what the records reflect with respect to such...

Mr. Somers: The demand was made by the Steel Workers.

Hearing Officer: Is it the Employer's position that it at this time declines to recognize the Petitioner as exclusive bargaining agent for the Employees in the unit petitioned for until such time as it or they are determined as such in an appropriate unit determined by the Board?

Mr. Somers: That is our position. Our position was further stated in a letter which was sent to the Steel Workers.

Hearing Officer: You don't have a copy of the letter, Mr. Somers?

Mr. Somers: I don't believe that I do. We are declining [28] to recognize them at this time anyway.

Mr. Pyle: Well, let me advise the Company that the mere fact that the Union has filed a petition here does not

relieve the Company of its duty to recognize the Union as the exclusive bargaining agent of the employees, since the Union has been designated as such by a majority of the employees in an appropriate unit.

Mr. Somers: Mr. Hearing Officer, our position has been stated clearly to the Union.

Hearing Officer: All right, thank you, gentlemen. Do any of the parties contend that there is a contract bar to an election in this case? Mr. Somers, on behalf of the Company?

Mr. Somers: No, sir.

Hearing Officer: Mr. Pyle on behalf of the Petitioner?

Mr. Pyle: No contract bar.

Hearing Officer: Tell me, Mr. Somers, is there any history of collective bargaining involving any of the employees at the plant?

Mr. Somers: Not within the last 15 years.

Hearing Officer: Thank you, sir. With respect to the question of determining an appropriate unit, the petition reads as follows: "All production and Maintenance employees employed at the Employer's plant located at 8 Business Street, Hyde Park, Massachusetts, excluding [29] all office clerical and professional employees, guards and supervisors as defined in the Act.

At the opening of the hearing, my recollection is that the petition was amended to indicate the correct address of the Employer as 98 Business Street, Hyde Park, Massachusetts, right?

Mr. Somers: That's correct.

Mr. Pyle: Right.

Hearing Officer: Mr. Somers, do you stipulate that that is an appropriate description of the unit?

Mr. Somers: No, we believe that the description of the unit is too broad, and there are some questions which we have, and we ourselves are not able to resolve and would

like the Board to resolve as to the exclusions and inclusions of certain individuals.

Hearing Officer: Thank you, sir. You have a witness here today to give testimony with respect to . . .

Mr. Somers: Yes, I do.

Hearing Officer: All right, have the witness take the stand.

Mr. Pyle: Can we ask, Mr. Hearing Officer, what their position is as to the unit description. I understand he has some problems about inclusions and exclusions.

Hearing Officer: All right, sit down, Mr. Witness for a moment. What is the position, Mr. Somers?

[30] Mr. Somers: We have a question as to the inclusion of employees in the Record Keeping Department.

Hearing Officer: A little bit louder?

Mr. Somers: In the record keeping department. Also the inclusion or exclusion of employees who are in the shipping and receiving area and a truck driver. And with regard to the Products Division, Products Department, it is our position that the assistant foremen should be excluded from the unit.

Mr. Pyle: Who is that?

Mr. Somers: There are four.

Mr. Pyle: Who are they?

Mr. Somers: Ivory Scott, Raymond Zagrafios, George Morris and Alonzo Massey.

Hearing Officer: And the Employer asks that they be excluded on the basis of supervision, is that it?

Mr. Somers: That is correct.

Hearing Officer: All right, is there any others?

Mr. Somers: In addition there is . . .

Hearing Officer: So we have the problems that you're raising now with respect to the unit, are namely, the record keeping department?

Mr. Somers: Correct.

Hearing Officer: Is number one. And the Employer's position with respect to the department there . . .

Mr. Somers: We really have no position. We would like [31] the Board to resolve this.

Hearing Officer: And approximately how many employees are in the record keeping department?

Mr. Somers: Four employees.

Hearing Officer: Four, and shipping and receiving area and truck driver?

Mr. Somers: Right. This would be . . .

Hearing Officer: What's the . . .

Mr. Somers: This would be four employees in the shipping and receiving and truck driver.

Hearing Officer: Four employees.

Mr. Pyle: Four excluding the truck driver?

Mr. Somers: Including the truck driver.

Hearing Officer: And again, is it the same position?

Mr. Somers: Same position with regards to these people as with the record keeping—no position.

Hearing Officer: And the Products Department you have already stated, those are the problems that we'll take testimony concerning.

Mr. Somers: Right. Insofar as the Products Department, the question is strictly as to the assistant foremen, these four that were named.

Mr. Pyle: Does the Employer agree that a unit of all production and maintenance employees at the Business Street location is an appropriate unit?

[32] Mr. Somers: 98 Business Street, yes.

Hearing Officer: All production and maintenance employees—

Mr. Somers: I think we should put in of Magnesium Casting Co.

Hearing Officer: —of Magnesium Casting Co. at 98

Business Street. And what are your exclusions? No questions concerning the office clerical? They are excluded?

Mr. Somers: Office clericals, professional.

Hearing Officer: Professional employees...

Mr. Somers: Guards, supervisors.

Hearing Officer: —guards, supervisors, as defined in the Act. So that the parties are in agreement as to the unit, namely, all production and maintenance employees of Magnesium Casting Co. located at 98 Business Street, Hyde Park, Massachusetts, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. That is the general language of the description of the unit, gentlemen?

Mr. Somers: Except that we would like the following the determination of the Board to either specifically include or exclude these employees which we are discussing.

Hearing Officer: Thank you.

* * *

[33]

HARVEY BERMAN

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined and testified as follows:

* * *

Hearing Officer: Give the Reporter your name and address?

The Witness: Harvey Berman, 93 Clements Road, Newton, Assistant to the President.

Direct Examination

Q. (By Mr. Somers) Mr. Berman, are you familiar with the operations of Magnesium Casting Co.? A. Yes, I am.

[34] Q. And is one of the departments of Magnesium Casting Co. the products department? A. Yes, it is.

Q. Could you describe for us your responsibility with regard to the products department? A. I have a total control over the products department, and this involves

sales, liaison with sales. I control production, and the line of responsibility from me is to a man named Chet Williams to two foremen named Steinberg, Kabilian to four assistant foremen, named Morris, Massey, Zagrafos and Scott.

Mr. Pyle. Who is the second foreman? How do you spell that?

The Witness: Kabilian, K-a-b-i-l-i-a-n.

Q. (By Mr. Somers) Could you describe for us what is done in the products department? A. The products department takes raw zinc die castings and raw rood molding and manufactures a desk accessory, maybe a pen set, maybe ash trays, etc. Our operations can be broken up into four categories—metal finishing, electro plating, assembly and packaging.

Q. And over these four categories, are there individual assistant foremen? A. Yes, there are.

Q. And who is the assistant foreman for metal finishing?
[35] A. Raymond Zagrafos.

Q. And who is the Assistant foreman for Electroplating?
A. Ivory Scott.

Q. And for assembly? A. There are two teams of assemblies, one headed by George Morris, and one headed by Alonzo Massey.

Q. And is assembly and packaging actually together?
A. It's a simultaneous operation.

Q. Now, with regard to the function of the assistant foreman, addressing ourselves to Ivory Scott, could you describe for us his functions? A. Yes. Ivory Scott's functions are to control the quality and quantity of material being plated. This material being zinc die casting, as I mentioned before. He can fire. He can transfer. He can assign. He may recommend for raises, has done so. He has notified people of raises. He does exclusion analysis, I hope. Makes recommendations with regard to personnel. Attends Management supervisory meetings which are held on a weekly basis.

Q. Who attends these meetings with the assistant... what other assistant foremen? A. The three assistant foremen who are mentioned, in addition to Ivory.

Q. Who else? A. The two foremen, Kabilian and Steinberg, [36] the Assistant Plant Manager, Chet Williams, and I attend them.

Q. Now, could you tell us what's discussed during these meetings? How often are they held? A. These meetings are held on a weekly basis. My attendance has not been as regular as it should have been.

Q. Well, during the times that you have attended these meetings, could you tell us what topics were discussed? A. Well, a wide range of problems, all dealing with actually critiques of the week's work. These involve personnel problems. Who's doing a good job. Who isn't doing a good job. They involve a dialogue between or among foremen, assistant foremen, the Plant Manager and myself as to the quality of each other's job. They involve work load, discussion of work load. They involve production policy with regards to manpower, disciplinary measures that need to be taken.

Q. Has Mr. Scott ever himself recommended a man for discharge or been involved in any proceedings which... A. He was involved with one incident which we are quite happy with. One of his employees, a man named William Washington, decided that he was not going to do a job that—

* * *

[37] Hearing Officer: Whether Scott was involved in what was it, Mr. Somers?

Q. (By Mr. Somers) ... in an action involving discharge? A. Well, according to Scott this happened. The information was relayed at a meeting that Scott told us he threatened to discharge Washington if he did not do the job which was assigned to him. Washington had actually gotten

his coat. He had gotten ready to punch out. Scott had told him if he left, that would be it. The man returned to his job. [38] At these meetings, we have stressed the authority of the assistant foremen to fire personnel.

Q. Now, with regard to the assigning of work, how does an assistant foreman participate, specifically, Mr. Scott, participate in the assignment of work? A. Well, the operations in the plating room are to be broken up into loading of tanks, unloading, scratch brushing, and Scott will as one operation becomes unnecessary, shift the man from that operation, the loading of tanks, and move him on to scratch brushing as the need occurs. Do you want more detail?

Q. With regard to Scott or any of the other assistant foremen, would they be involved in transferring an employee? A. If he needs more people, or if he doesn't need someone, let's say one of the tanks are shut down, he will notify his supervisor.

Mr. Pyle: You're speaking of Scott now?

The Witness: Pardon me?

Mr. Pyle: You're talking about Scott now?

The Witness: That's what the question was about.

Q. (By Mr. Somers) Are employees interchanged between departments? A. Yes, when you say departments, I think you had better define it. Employees are interchange— [39] Q. Well, beyond products department? A. Yes. There has been a movement of employees from the Products Department into the M-525 department.

Q. That's a government job? A. Which is a Government job, right.

Q. And how does the rate of pay of Mr. Scott compare with the employees underneath him? A. I'd say between 15 and 40 cents an hour more.

Hearing Officer: What was it?

The Witness: 15 to 40 cents an hour more.

Hearing Officer: Then the ...

The Witness: Than the people underneath him.

Q. (By Mr. Somers) Now, you stated that during the Management meetings, there were discussions with regard to manpower requirements? A. Right.

Q. Now, what is the participation of the assistant foremen in such requirements? A. They are our most direct link to our employees. They know whether or not they need more help, and they state if they do—state if they don't.

Q. I see. And what follows their demand? A. An order into the Personnel Office to hire people.

Hearing Officer: And who directs the order into the personnel department?

The Witness: I do.

[40] Hearing Officer: You do. And it comes to you from whom?

The Witness: In the last four weeks, it's been coming directly from Chet Williams to the personnel manager.

Q. (By Mr. Somers) Have any of these assistant foremen recommended raises for other employees? A. Yes. I can't think of a specific instance.

Q. And have these raises been granted? A. Yes.

Mr. Pyle: I object. If he can't think of a specific instance . . . I move that be stricken, Mr. Judge.

Hearing Officer: The question was do any of them have the authority.

Mr. Somers: Have they in the past recommended . . .

The Witness: Yes, Ivory Scott has recommended a raise for Donald Noiles.

Q. (By Mr. Somers) And, in fact, what happened? A. He was granted a 10-cent raise.

Hearing Officer: Who made the recommendation?

The Witness: Ivory Scott.

Mr. Pyle: Who was the individual involved?

The Witness: Donald Noiles.

Q. (By Mr. Somers) Now, are there occasions when employees request time off for medical appointments or personal business? [41] A. Yes.

Q. And does the assistant foreman have any authority with regard to granting that time off? A. What he'll do is to carry the message to me sometimes.

Q. If you're not there, what will happen? A. Well, it's either I am there or Chet Williams is there, so that occasion does not occur.

Hearing Officer: What was the answer to that question? If you're not there . . .

The Witness: Chet Williams is there. The possibilities of being without myself or Chet Williams are very limited.

* * *

[42] Q. Who do they notify they are leaving? A. They notify the assistant foreman.

* * *

[44] Hearing Officer: Approximately how many employees are involved at the entire plant?

The Witness: About 260.

Mr. Pyle: What does that figure include? Everybody in [45] the unit as we have described it?

The Witness: We don't know the unit.

Mr. Somers: Well, the question is as to who is included and who isn't.

Mr. Pyle: Well, you raised the question about a dozen or . . .

Mr. Somers: Approximately 250 to 260 employees.

Hearing Officer: In the unit that we originally described.

Mr. Pyle: Depending on whether you exclude or include the people in question, is that it?

Mr. Somers: Correct.

Hearing Officer: And run down these departments. Can you tell me who the foremen of these departments are? The die casting department?

The Witness: The general foreman is Mal Emack.

* * *

[46] Hearing Officer: I think it will save time. Mr. Emack is the Dye Department.

The Witness: Now, there are three shift foremen. It's Herbert Davis, Darnell Johnson, Adam Smith. The assistant foremen are Sawyer, Ford and Bill Adams.

Mr. Pyle: And they are what, the—

The Witness: Assistant foremen in die casting.

* * *

[47] Mr. Somers: General foreman, shift foreman, take the position they are excluded. I understand the Union doesn't know whether the assistant foremen are excluded or included, is that correct?

Mr. Pyle: I will have to check.

Hearing Officer: Sir?

Mr. Pyle: To give you a complete answer, I will have to check on it. I know part of the answer, but I will give you a complete answer after I check on it.

[48] Hearing Officer: All right, let's go to the next department?

Mr. Pyle: I'm sorry. What's the Company's position on the assistant foremen?

Hearing Officer: Mr. Somers?

Mr. Somers: On the assistant foremen?

Mr. Pyle: In the dye casting department?

Mr. Somers: Dye casting, they should be excluded.

Mr. Pyle: As supervisors?

Mr. Somers: Yes. What's the Union's position?

Mr. Pyle: I have to check. I told you I have to check. We'll have a conference on it.

* * *

[50] Q. (By Mr. Somers) Do the assistant foremen in plating department—this would be Zagrafos and Mr. Scott —do they make out any written reports? Does Mr. Scott

make out any written reports? A. Mr. Scott makes out the reports.

Q. Can you tell us what that is? A. Quality control sheet, which is an attempt to formalize the operations of the plating department and to provide an hourly check on the perimeters that determine plating quality.

Q. And what happens to these reports? A. These reports are checked by the foremen and by me.

Q. And in checking them over, what are you looking for? [51] A. Well, we have only been doing it for about three months, and we haven't got enough hard evidence. We are trying to do it to determine tank solution renewal cycles. It's very technical. What we are looking for actually is some method of predicting quality variance which will permit us to establish some kind of regular procedure to eliminate quality deficiencies.

Q. When you speak of quality deficiencies, you're talking about the performance of the job by the employees? A. And the quality of the equipment, tank exclusions, current densities, various things. And also on a day-to-day basis to do those things which have to be done. For example, maintenance of heaters, maintenance anodes, etc.

Q. In looking at a quality control check list, can you tell from this list where the employees have erred in their performance, if they have? A. Yes, often it's possible to tell.

Q. I'd like to have these marked as Employer's 1(a), (b) and (c). 1(a) is dated 3/18/68. 1(b) is dated 3/19/68, and 1(c) is dated 3/25/68.

(The documents above-referred to were marked Employer's Exhibits 1(a), (b), and (c) for identification.

Hearing Officer: For the record, would you tell us the number of employees in the products department?

[52] Q. (By Mr. Somers) For the record, how many

employees are there in the product department? A. Approximately 30.

Q. I show you what has been marked as 1(a), 1(b) and 1(c). Are these the quality control sheets which you're talking about? A. Yes, they are.

Q. And these, do you recognize the signature on these? A. Yes. It's Ivory Scott's.

Q. And are these filled out on a regular basis now? A. I certainly hope so.

Q. Are they required to be filled out on a day-to-day basis? A. Yes, they are.

Mr. Somers: I'd like to offer 1(a), (b) and (c) in evidence.

Hearing Officer: Any objection to the Employer's introduction of Exhibits 1(a), 1(b) and 1(c)?

Mr. Pyle: No objection.

Mr. Somers: May I ask leave to substitute copies?

Hearing Officer: There being no objection, Employer's 1(a), (b) and (c) are received in evidence. You may substitute copies before the end of the hearing.

(The documents above-referred to, Employer's Exhibits 1(a), 1(b), and 1(c) for identification were received in evidence.)

* * *

[56] Q. Foremen also punch clocks? A. The foremen also punch clocks, including general foremen.

* * *

[60] *Cross Examination*

XQ. (By Mr. Pyle) How long had Ivory Scott been a foreman—I'm sorry, assistant foreman? A. Well, when I came in about six months ago, I revamped the production division. It was more than six months. It was June—9 months now. I revamped that department. And I was introduced to him as the assistant foreman. What his exact duties were prior to the month of June, I can't really assert.

XQ. Was that the first time you were with the Company?

A. No, I have been with the Company as a consultant for the past ten years.

[61] XQ. And what position did you take last June?

A. Assistant to the President.

XQ. That was the first time when you became connected with the production process? A. No, I have run a die casting machine, done a few things.

XQ. What was your position prior to last June? A. I am the father of the son that owns the business.

Mr. Somers: That's the title son of the owner.

* * *

[62] A. My father owns Magnesium Casting Co.

* * *

[64] XQ. (By Mr. Pyle) Now, Mr. Ivory Scott is the assistant foreman, and how many employees does he have under him, so to speak? A. It varies between four and five.

XQ. Does he do any production work himself? A. Yes, he does.

[65] XQ. Would you describe the production work that he does? A. As he directs, he will move material through the cleaning cycle. Sometimes drying. Sometimes loading of tanks when the initial loader is busy setting up the day's work.

XQ. Does he have occasion to do any other work? A. Not to my knowledge. I think on Friday's he does do some maintenance work. He directs Don Noiles and a man by the name of Nocero in the filtering of solutions.

XQ. Donald Noise? A. Noiles.

XQ. N-o-i-l-e-s? A. Right.

XQ. And these two are employees who have something to do with filtering solutions? A. Yes.

XQ. What other employees do you claim he directs?

A. William Washington, and another man who we don't have at the present. We are short-handed.

XQ. So at the present time, you claim he directs three employees? A. Right.

XQ. And would you describe the area in which these employees work or what's the name of the area? A. Plating room. It's a room separated from metal finishing and polishing by walls. It's a different [66] ventilation system. Entrance to the room is provided by two doors. One into a vestibule. The other into the metal polishing and finishing area.

XQ. Now, Scott's pay is what, Mr. Berman? A. Scott's pay is between 15 and 40 cents more...

XQ. Well, what's the pay per hour?

Mr. Somers: Do you know his pay per hour?

The Witness: \$2.35 an hour.

XQ. And there is another employee who makes 15 cents less? A. Yes.

XQ. And that's which, Noiles or Nocero? A. I imagine both of them make 15 cents less. One makes probably 25 cents less. A new employee would come in at a dollar 80.

XQ. And this is some kind of a progression after a \$1.80? A. Yes, there is.

* * *

[68] XQ. (By Mr. Pyle) What's the progression? A. \$1.80, \$1.85, \$1.90, \$1.95—one month, three months, six months.

XQ. All right. Now, you indicated that one of the—I'm sorry. Is that the end of the progression? A. Yes.

XQ. \$1.95? A. Right.

XQ. How does an employee make— A. On the merit basis.

XQ. I see. Beyond that it's on merit? A. Right.

XQ. Up to what figure?

Mr. Somers: Objection.

Hearing Officer: I will allow the question.

Mr. Somers: As to which kind of employee which classification?

Mr. Pyle: Well, any of the employees in the little group here.

Mr. Somers: In metal plating?

Mr. Pyle: Yes, in the plating room, that plating room that we're talking about.

The Witness: Do you include Ivory Scott?

Mr. Pyle: Yes.

[69] The Witness: I don't know. I haven't got a top figure for Ivory Scott.

XQ. (By Mr. Pyle) How about for the other employees—A. I don't know. I think \$2.25, \$2.30. Look, I think it's a ridiculous question. Next year I'll give you a different answer.

XQ. In other words, you have no fixed maximum?

Mr. Somers: This is a merit system.

Mr. Pyle: Some merit systems have...

Mr. Somers: It doesn't necessarily require a fixed amount as a maximum.

Mr. Pyle: Some have a ceiling and some have no ceiling.

XQ. (By Mr. Pyle) Does your merit system have a ceiling? A. It has no ceiling.

Mr. Somers: They can earn up to \$4 an hour.

XQ. (By Mr. Pyle) So if these employees merited they could make more than Scott? A. I beg your pardon?

XQ. If these employees merit is sufficient, they can be paid more than Scott, is that right? A. No.

XQ. Then the ceiling is Scott's wage? A. I don't know what Scott's wage is—what the limit is. I mean, you're dealing with relevants here, which move, which I am sure you are aware of.

XQ. Well, let me put it this way. There is no limit as to how [70] high Scott can go that you know about, and

there is no limit as far as the others are concerned. A. Yes, there is a limit.

XQ. Well, is that the policy which is written somewhere? A. No, that's my policy.

XQ. Have you ever expressed it before?

Mr. Somers: Objection.

Hearing Officer: I will allow the question.

XQ. Have you ever expressed that before? A. To whom?

XQ. To anybody? A. Chester Williams. We always try to keep our foremen 15 or 20 cents higher.

XQ. That's what you call an assistant foreman? A. Depending on length of service it may be considerably more.

XQ. Now, in terms of the production work Mr. Scott does, is there any work that he does which is not done by Noiles or Nocero or Washington? A. Yes, considerable.

XQ. What work does he do above and beyond what those three do? A. Quality. Attends Management meetings.

XQ. No, I am talking about production. A. No, the things he does are supervisory—the things that are different.

[71] XQ. So, in other words, insofar as the actual production work is concerned, his work covers the same duties as Noiles or Nocero or Washington? A. When he's on production, he can do the same jobs. He does not necessarily do the same jobs though. It would depend very much on how he sees his needs at the moment.

Hearing Officer: How often you said when he's on production, how often is he on production?

The Witness: I can't estimate that.

XQ. (By Mr. Pyle) All right, now, apart from the production work that the other employees do, you have told us that Mr. Scott fills out these quality reports? A. Yes.

XQ. Does he fill them out himself? A. Of course.

XQ. And he completes them daily or hourly or more frequently? A. Well, he checks them off. If you look at the

list, you'll see there's a space for hourly checks, and he's expected to make an hourly check.

XQ. And in making these checks, he observes the quality of the products, is that correct? A. Correct.

[72] XQ. Takes care of anything else in making these reports, other than quality of the product? A. Well, he's observing everything in the room.

XQ. The ceiling? A. Yes.

XQ. The floor? A. Yes, as a matter of fact.

XQ. Walls? A. I hope so.

XQ. Now, apart from these quality reports, what else does Mr. Scott do as a regular procedure? A. He does the initial make-ready.

XQ. Do the other employees ever do the initial make-ready? A. No.

Hearing Officer: What's the initial make-ready?

The Witness: Well, he takes temperatures, makes sure that his solutions are up to temperature. He will pull a chemical analysis of the solution once a day. This is not a make-ready. This is part of the checking that goes on. He may do this at the end of the day, whenever he finds the convenient time.

XQ. (By Mr. Pyle) Do any of the other employees ever do that chemical analysis? A. My general foremen. Sometimes my plant manager, assistant plant manager. We try to have it done as frequently as possible. In addition, he takes a PH reading, which indicates the [73] acidity, as you probably know from high school chemistry, of the solution. He attends meetings, assigns work.

XQ. He assigns work within the? A. Within the place.

XQ. Within this room? A. Yes. There are actually two rooms. There is a room where they plate gold.

XQ. Real gold? A. Unfortunately no.

XQ. Unfortunate for whom? A. I'd like to be in that business. No, it looks like gold.

XQ. All right. Now, you testified that Scott does the initial make-ready and chemical analysis and takes a PH reading, and that the other employees in the department do not do these jobs? A. Right, and then he assigns these employees for the day and on an hour-to-hour, minute-to-minute basis during the day as the work load shifts.

XQ. Well, is the initial make-ready of the solutions work that the other employees wouldn't be qualified to do? A. They may do it with direction from Scott or adding a new cleaner. If they do so, they would do it under his control.

[74] XQ. That work has to be done carefully, I take it?
A. Yes.

XQ. And if you know how to do that, the initial make-ready of the solution, you are a more valuable production employee? A. Right. More valuable as a supervisor, too.

XQ. Now, you state that Mr. Scott can fire an employee?
A. Right.

XQ. Has he ever done it? A. He—

XQ. Has he ever fired an employee? A. No, he has not.

XQ. I see. But you claim he has the authority to fire?
A. Yes.

XQ. And he has the authority to fire, and that's unreviewable? A. It is unreviewable, yes.

XQ. So he could keep a totally incompetent employee in the department if he wanted to? A. I didn't say that. He could discharge on an unreviewable basis. If we saw somebody was totally incompetent, my other assistant foreman might fire him.

XQ. So he's not the only with with the authority to discharge in his department? A. No, the other supervisors as well.

Hearing Officer: He takes it up with whom first?

The Witness: He need not.

[75] Mr. Pyle: We're talking about something that's never happened, Frank.

Mr. Somers: Well, there has been an incident here, and the record will show it, which would have resulted in discharge had certain conduct not been followed by the employee.

XQ. (By Mr. Pyle) Now, you state that Mr. Scott has the authority to transfer? A. Yes. If...

XQ. From where to where? A. He can transfer into the metal polishing department. And he can request and pull people from the metal finishing department.

XQ. You mean if he needs additional help? A. He can tell the other assistant foremen that he needs somebody. Between the two of them, they will work out something.

XQ. So if the other assistant foreman agrees, then an employee is transferred from one area to another? Is that right? A. Yes.

XQ. So that he can't transfer all by himself. He's got to have the agreement of the other... A. If he had too much work, he could just send somebody out to the other assistant foreman. Let's say one [76] of the tanks shut down.

XQ. All right, but the employee couldn't begin work in the other area until the other assistant foreman approved? A. Until the other assistant foreman assigned him to a job.

XQ. Now, you testified that he can assign? By that you mean he tells the employees in the department— A. Which job to do.

XQ. What job to do? So that he does not assign work outside of his own room? A. No.

XQ. He doesn't assign work outside of the three employees that are in there? A. Right. You know, I still want to emphasize the two-room deal.

XQ. Yes, the gold room. Now, in this incident with Wil-

liam Washington, how long ago did that take place? A. Oh, within the last six months.

XQ. You mean about six months ago? A. Within the last six months. I can't give you a date.

XQ. Well, yesterday was within the last six months.
A. Right.

Hearing Officer: Approximately what's your best estimate?

The Witness: Three or four months ago.

[77] XQ. (By Mr. Pyle) Now, you testified that Scott reported to you that Washington was about to leave the department? A. No, it didn't happen that way. I was informed of this at a supervisor's meeting.

XQ. You were informed about it by Scott? And what did Scott say? A. Washington had—He assigned Washington a job. Washington refused to do it. Got his coat. Scott said if you leave, don't come back. Washington decided that he would stay.

XQ. Was the Company policy that if an employee leaves work, he's discharged? A. Not necessarily. It's happened several times, as a matter of fact.

XQ. You mean, an employee could go without being discharged under certain circumstances? A. Yes, it happened many times.

XQ. Have you had employees go home for a day or two without being discharged because they didn't want to do the work? A. Yes,—no, for various reasons.

XQ. Well, let's take an employee who refuses to work and leaves the plant. Have there been any such cases where you failed to discharge that employee? A. Yes, several—many—as a matter of fact. We have a shortage of help.

[78] XQ. Why is that? A. Why is that? Because we have a war. Not many young people showing up.

XQ. You testified Scott recommended raise for . . .
A. Noiles.

XQ. Noiles. How long ago was that? A. I think within the last month.

XQ. After the petition was filed? A. I haven't the vaguest idea. I don't see as it is related.

XQ. Well, let's assume it's unrelated. Was it before or after the petition? A. I don't know.

Mr. Somers: Objection. I don't see the relevancy of the question.

XQ. But you do testify that it was within the last month? A. Perhaps. I mean, I'd have to go back in my records.

Mr. Somers: I had an objection to that question. I haven't heard a ruling.

Hearing Officer: The objection is overruled. If the witness can give an answer...

The Witness: I can't give exactly when. I can supply it later.

Hearing Officer: Can you give an approximate date at this time?

[79] The Witness: I did. About a month.

XQ. (By Mr. Pyle) Well, do you know at the present time whether it was before or after the petition was filed? A. No, I don't know.

* * *

[86] XQ. (By Mr. Pyle) Mr. Berman, do your foremen receive any fringe benefits the rank and file employees do not? A. Some of my foremen do.

XQ. What are those fringe benefits that some of the foremen receive? A. There is a pension plan, including some kind of major medical, health insurance.

XQ. Master medical? A. Yes.

XQ. Some of your foremen then enjoy master medical coverage? A. Some do.

XQ. Do the assistant foremen enjoy master medical coverage? A. No, they don't.

XQ. Now, on the pension plan, do the rank and file employees have a pension plan? A. No, they don't.

XQ. Do the supervisors have a pension plan? A. Yes, they do some of them.

XQ. Do the assistant foremen, are they covered by that pension plan? A. They are not.

* * *

[87] XQ. (By Mr. Pyle) All right, some of your foremen do enjoy but the assistant foremen don't? A. Some of my foremen don't.

XQ. Do you know why the foremen don't...

Mr. Somers: Objection. I don't think that's relevant why they don't and why they do.

Hearing Officer: I will allow the question.

The Witness: There are various standards which determine...

XQ. Earning level? A. No, not necessarily.

XQ. Is that one of the standards? A. I beg your pardon?

XQ. Is that one of the standards? A. I don't believe so.

XQ. Is the number of employees he supervises one of the standards? A. I don't believe so.

XQ. What are the standards?

[88] Mr. Somers: Objection.

Hearing Officer: If he knows. All right, I will allow the question, if he knows.

The Witness: I really can't tell you. There are not definite things that have been established.

Hearing Officer: Did you say the foremen were covered by the pension plan?

The Witness: Some of them. And there are some foremen that are not covered.

* * *

[90] XQ. (By Mr. Pyle) Is there any difference between the vacation plan covering foremen and that covering rank and file employees? A. None.

XQ. How about the assistant foremen? A. No, there is no difference.

Mr. Pyle: Everyone in the same place gets the same—
Hearing Officer: Gets the same vacation?

Mr. Pyle: So that doesn't cut one way or the other.

Hearing Officer: Do you have holiday...

The Witness: Yes, and the same applies for holidays.

Hearing Officer: Foremen, assistant foremen and rank and file employees?

The Witness: Correct.

[91] XQ. (By Mr. Pyle) All receive the same benefits?
A. Right.

XQ. How about, do you have any different insurance plan? A. That's part of this— The plan that I have is a comprehensive plan. I can't give you any of the details. If you wish, we can provide you with the details.

XQ. Will you check with your lawyer to see if he sees fit—

Mr. Somers: Well, I think the question is how does it differ between foremen and assistant foremen, Management, production and maintenance. I don't know that the specific benefits are important. The question being whether the plans differ. Wouldn't you say? So, I mean...

Mr. Pyle: We welcome all the information we can get.

Mr. Somers: Yes, well, I don't know, do you know, if they differ?

The Witness: There is only one plan. And some of the foremen get it.

Mr. Somers: And some don't.

The Witness: That's right. That's right.

Hearing Officer: Did I hear you say some receive—

Mr. Somers: Some receive.

Hearing Officer: Some receive the coverage and some don't?

[92] Mr. Somers: Right.

Hearing Officer: And how about as far as the coverage for the assistant foremen?

The Witness: There is no coverage for the assistant foremen.

Hearing Officer: And the rank and file employees, there's no coverage for the rank and file employees?

Proceed, Mr. Pyle.

XQ. (By Mr. Pyle) So that we would be a little more accurate to say that you have what you understand is the pension plan and some life insurance and medical insurance, and that all of these features are provided for some foremen . . . A. And not to others.

XQ. And not to other foremen. And not to any assistant foremen? A. Correct.

XQ. And not to any rank and file employee, right?
A. Right.

XQ. Are your foremen hourly paid? A. Yes, they are.

XQ. Your foremen punch a time clock? A. Yes, they do.

XQ. Now, in the products department to what foremen does [93] Mr. Scott report? A. Charles Kabilian.

XQ. And is Mr. Kabilian the foreman whose jurisdiction includes electroplating? A. Yes, and metal finishing and polishing.

XQ. Now, you have told us that there are four employees in electroplating including Mr. Scott at the present time. How many employees are there in metal finishing and polishing? A. Five or six, including the assistant foreman.

XQ. So that Kabilian has a total seven—ten employees working under him at the present time? A. Plus one or two more people. Sometimes three and four people to move materials to do janitorial work in the area.

XQ. In other words, he supervises them when they are in his area? A. No, their work applies specifically to his area.

XQ. All right. Do they regularly work for him? A. Yes.

XQ. So you would say that Kabilian has between 10 and 12 employees working under his supervision? A. I would say that, yes.

XQ. And one of them is Mr. Scott and another is Mr. Zagrafos? Okay. Now, working with Scott you have three others, right now. And— A. Working for Scott.

* * *

[94] XQ. And then there are two other employees under Kabilian who are not within the jurisdiction of Scott or Zagrafos? A. No, no, they all are. If, for example, either Zagrafos or Scott wants something moved, they can tell this one person in particular, Constantine Malinowski—

* * *

[95] XQ. How many employees under the jurisdiction of Mr. Steinberg? A. Ten, 12.

XQ. Is that a typical or average number of employees that are under the jurisdiction of a foreman, 10 or 12? A. It's an average in my place—in the products division. And each assistant foreman has four to five. Sometimes more. Sometimes less.

* * *

[97] XQ. And is it customary in giving—whether to give somebody a raise in the electroplating area that you would consult Kabilian? A. I think I would consult either Kabilian or Scott, depending on whoever I saw first in the shop. I have no set policy on it.

* * *

XQ. So that you would give a raise if either the assistant foreman or the foreman recommended it? A. I have done so.

XQ. You would make your own independent investigation? A. Sometimes. Sometimes not.

[98] XQ. I think you said Scott recommended a couple of employees for an increase, didn't you? A. Noiles.

XQ. And did you ask Kabilian's opinion? A. I think he said yes.

XQ. And what was your opinion? A. Yes.

XQ. Did you investigate it independently the opinion of the foreman and the assistant foreman? A. No.

* * *

XQ. (By Mr. Pyle) Would you expect your assistant foreman in the products area to bring their disciplinary problems to the attention of the foreman? A. No, not necessarily.

* * *

XQ. You never suspended people? Do you ever fire people? A. Yes.

XQ. And would the assistant foremen bring that to the attention of the foremen before taking any action? A. Not necessarily.

XQ. Do you know of any assistant foreman who's done it entirely on his own without consulting his foreman? A. I don't know of anybody [99] who's been fired, with one exception.

XQ. Oh, I see. What was the exception? Where was that, in what area? A. It was in plating. No, it wasn't in plating. It was in metal finishing.

XQ. That's the only person who's been fired since you have been with the plant since last June? A. No, I know of one case where the assistant foreman did fire.

XQ. Without consulting anybody? A. He said he was going to do it, and I said good.

XQ. Oh, he cleared it with you first? A. I said he was going to do it.

XQ. And you agreed? A. I said "good."

XQ. Indicating agreement? A. I said "good."

* * *

[100] XQ. (By Mr. Pyle) Just so the record is clear, I understand that you have never suspended people since

last June, and you have had only one discharge case?

A. No, more than one. I told you the second one I thought of. The person discharged was a man by the name of Frank Angrasio.

XQ. All right, but two discharges? A. Yes.

XQ. Does Mr. Kabilian work in the area where Mr. Scott and Mr. Zagrafos do their work? Does he work in the same general area? A. In the same general area.

* * *

[101] XQ. (By Mr. Pyle) Is the foremen paid more than the assistant foremen? A. Yes.

XQ. How much more an hour? A. 60 cents more an hour.

Mr. Somers: We're talking about all the assistant foremen?

Mr. Pyle: No, I am talking about this—

(Discussion off the record.)

Hearing Officer: So that Massey and Morris, the differential between them and Steinberg is what, what did you say was the figure?

The Witness: 85. 85, 90. I'm not exactly sure. All the assistant foremen get the same rate.

XQ. (By Mr. Pyle) They all get \$2.35? A. All the assistant foremen get the same rate.

XQ. Plant-wise you mean? A. No, in the products division. In die casting they get more.

XQ. Now, has Mr. Zagrafos ever fired anybody? A. Yes, he has.

XQ. Who's that? A. I told you, Mr. Angrasio.

* * *

[102] Has he ever hired anybody? A. No, the personnel department hires people.

XQ. All hiring is done in the personnel department? A. Yes, with interviews by our assistant foremen and the teaching by assistant foremen after they are hired.

XQ. That's one of the jobs, the assistant foreman is to instruct and teach the employee? A. Correct.

XQ. Is the assistant foreman normally the most experienced employee in a particular area? A. No, not necessarily.

* * *

Hearing Officer: The assistant foremen get paid for overtime?

The Witness: Yes.

Hearing Officer: Is there any difference in dress between [103] the assistant foremen and the other employees in that department?

The Witness: Well, upstairs there is a difference between them because the—

Hearing Officer: I am talking about Scott, Morris, Zagrafos, and Massey.

The Witness: Upstairs the assistant foremen are men, and the work is not very messy, and their dress is pretty much like street clothes—not like die casting dress. The girls though happen to wear work clothes upstairs. The fellows downstairs have work clothes, and well, Scott usually dresses very well and keeps himself very neat. So he dresses on an average better than any of the people working for him. Zagrafos I would say dresses pretty much the same as the people whom he directs.

XQ. (By Mr. Pyle) Would you say that Scott has a thorough knowledge of all the operations in the plating department? A. Yes, I would.

XQ. Is that a prerequisite for the job of assistant foreman in the plating department? A. Yes, he has been sent to school to learn the job. He knows the job better than I do. He knows it better than my foremen I might add.

XQ. In other words, you would have to have a thorough knowledge in order to train the new employees? A. Yes.

In order to run a [104] department, you have to have a thorough knowledge.

Hearing Officer: Assistant foremen Massey and Morris also work in their department?

The Witness: Not as much as Scott.

Hearing Officer: How much does Morris work?

The Witness: It's a very hard question to answer. The majority of their time is spent keeping the line flowing, checking for quality, making sure that operations are being done properly; and this is more true of Zagrafos and Morris than it is of Scott. His responsibilities are continually watching the quality of his work which means not working a substantial portion of his time in order to check out the quality to see what's happening to try to fix whatever is going wrong. I would say that neither Massey or Morris do very much work physical work. And I would say Zagrafos does exceptionally little, except on a fill-in basis.

* * *

[115] *Redirect Examination*

Q. (By Mr. Somers) ***

[116] Q. Does the foreman you described do some of the assistant foremens' functions in doing the initial make-ready, chemical analysis, taking a PH reading in addition to their attending meetings and designing work, does the foreman participate also in the initial make-ready and chemical analysis? A. Yes, the foremen can.

Q. Now, you stated that some foremen receive certain benefits and some foremen do not. Is this determined by the length of service basically? A. More or less. It's not the criteria.

Q. How does the foreman dress compare with that of the assistant foreman? A. Very much the same.

Q. Now, you stated that Mr. Scott was sent to school.

[117] Was this at the Company's expense? A. Yes.

Q. And do you recall for what period of time? A. No, I don't.

Q. And was this in what area was this school, in plating? A. It was in plating, electroplating.

Q. And this was in order to train him in all of the operations of the plating department, is that correct? A. Correct.

Q. And this training would assist him in his responsibilities? A. Correct.

* * *

[118] Hearing Officer: Tell me for the record again all the assistant foremen, if I understood you correctly, receive \$2.35 an hour?

The Witness: Correct.

Hearing Officer: And the range rate between Scott, \$2.35, and the employees that are working with him was what?

The Witness: I think the closest one is 15 cents.

Hearing Officer: 15 cents?

The Witness: And it could go down to \$1.80, which is 55 cents.

Hearing Officer: And with respect to Zagrafos . . .

[119] The Witness: That's the same.

Hearing Officer: It would be the same.

The Witness: The closest one to him . . . I'm not sure . . . I would imagine it's ten or 15 cents.

Hearing Officer: And with George Morris?

The Witness: The closest one to him is probably 25 or 30 cents.

And the same thing goes for Alonzo.

Hearing Officer: The same 25?

The Witness: 25, 30 cents.

Hearing Officer: Who determines the quantity that is to go through the departments, Mr. Berman?

The Witness: I would say that the foreman does.

Hearing Officer: The foreman does.

The Witness: He's placed in charge of placing the work in the room, and then it's up to the assistant foreman to be able to get it through or to try to get it through.

Hearing Officer: So that the foreman will place in the room X number of items that are to go through this week or this day?

The Witness: No, it doesn't work that way. For instance, we prepare a very large batch of material, and the foreman is the one who does the preparing. The assistant foreman then can choose [120] the plating room, for example, this material is racked up after having gone through various operations in metal polishing. The foreman can then choose the work he wants to place in the tanks from the racks.

Hearing Officer: I see. Then the assistant foreman picks it up from there?

The Witness: Correct.

Hearing Officer: Have you had any layoffs out there in the plant?

The Witness: No.

Hearing Officer: Since you have been there?

The Witness: None.

* * *

Hearing Officer: The witness is excused.

Excuse me just one moment. Who is the assistant foreman in the die casting department?

The Witness: Obedia Ford, Norman Sawyer and Bill Adams.

* * *

[121]

OBEDIA FORD

was called as a witness by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

Hearing Officer: Give the reporter your name, sir?

The Witness: Obedia Ford.

Direct Examination

Q. (By Mr. Pyle) And your address? A. 10 Hartwell,
Dorchester, Massachusetts.

Q. And you are employed at the Company? A. Magnesium
Casting Co.

Q. How long have you worked with the Company?
A. Four years.

[122] Q. In what department do you work in? A. Die
casting department.

Q. Do you have some kind of a title there? A. Assistant
foreman.

Q. I believe there are two other assistant foremen in
the die casting department? A. Correct.

Q. Mr. Sawyer? A. Right.

Q. And Mr. Adams? A. Right.

Q. And who is the general foreman of the department?
Is that Mr. Emack? A. Malcolm Emack is the general
foreman.

Q. And I think there are three shift foremen, is that
correct? A. Correct.

Q. One for the morning, one for the afternoon and one
for the night shift? A. Well, the afternoon shift and the
day shift rotates, so you can call it two for the rotation
shift and one for the night shift.

Q. Thank you. Now, what's your work in the die casting
department? A. I am a machine operator permanently.

[123] Q. What kind of a machine do you operate? A. Die
casting machine.

Q. How many die casting machine operators are there
on your shift? A. It varies from five to seven or five to
eight, I would say.

Q. And is your work any different from the work of the
other die casting machine operators? A. No.

Q. Do you ever hire anybody? A. No.

Q. Ever fire anybody? A. No.

Q. Ever suspend anybody? A. No.

Q. Ever recommend anybody be fired? A. No.

Q. Ever recommended anybody be suspended? A. No.

Q. Ever recommend anybody get a wage increase? A. No.

Q. Ever recommend that anybody get a promotion? A. No.

Q. Ever transfer anybody? A. No, I have not.

[124] Q. When the foreman of the department is on vacation, do you take his place? A. Yes, I do.

Q. And who is that? A. Herbert Davis.

Mr. Pyle: Thank you. No further questions.

Hearing Officer: You take whose place?

The Witness: Herbert Davis.

Hearing Officer: How long is that period of time you fill in for Herbert Davis?

The Witness: Two weeks vacation.

Hearing Officer: What's your salary?

The Witness: \$2.55 per hour.

Q. (By Mr. Pyle) And what's the salary of the other machine operators? A. The one next to me is a Class A operator, \$2.45.

Q. Are you a Class A operator? A. Yes, I am.

Hearing Officer: The die casting operator gets \$2.45?

The Witness: Right, the Class A operator.

Mr. Pyle: That's all.

Cross Examination

XQ. (By Mr. Somers) Mr. Ford, how long have you been a die [125] caster not only for Magnesium but for other companies? A. At Magnesium, that's the only place I have been a die caster.

XQ. Is at Magnesium? A. Magnesium.

XQ. And how does your work differ from other die casters? A. Primarily it doesn't differ. I set up a machine, etc.

XQ. Is your machine different at all from other die casters? A. No, it is not.

XQ. Is your work any different? A. No.

XQ. You do set up work? A. Yes, I do.

XQ. You do all the other— Do all the other die casters set up work? A. The die casters who have experience.

XQ. Do you train? A. I used to train, but not any more.

XQ. How many of the other die casters do set-up work? A. Oh, on my shift I would say four.

XQ. And how many die casters are there on your shift? A. Well, it varies from five to eight.

Hearing Officer: Anybody ever tell you you were a supervisor?

The Witness: No.

XQ. (By Mr. Somers) What were you told when you ran the [126] shift when Davis was out? A. When I ran the shift when Davis was out?

XQ. Right. A. I wasn't given any specific statement. I wasn't given any kind of specific statement what to do. I mean, I was told I was an assistant foreman to take charge when the foreman was absent, and that's primarily what I do.

XQ. Now, has the foreman been absent on any occasion besides these two weeks? A. Yes, sick.

XQ. I see, and did you take over that time? A. Yes, I did.

XQ. And how much training do you do in a normal week when you have a new employee in your department on your shift?

Mr. Pyel: He says he doesn't do it any more.

A. I don't train anymore.

XQ. Have there been any new employees hired recently in your department on your shift? A. When, last week or . . .

XO. Well, within the last couple of months? A. Yes.

XQ. Can you recall who trained them? A. I would say

either Malcem Emack or Donald Johnson or Herbie Davis.

XQ. And all three of those men are foremen, is that correct? [127] A. Correct.

XQ. Do you know why you're not training any more? A. No, I was never told.

XQ. Do you receive a special rate— I will withdraw that.

Hearing Officer: Who did you say the foreman was, Mr. Ford?

The Witness: The foremen that train? Herbie Davis.

Hearing Officer: And how long has Davis been out sick?

The Witness: Oh, within the last three months, he's been out maybe a month.

XQ. (By Mr. Somers) Are you familiar at all with the assistant foreman's job in the products division? A. No.

Mr. Somers: I have nothing further.

Mr. Pyle: That's all.

Hearing Officer: Did you ever recommend anyone for an increase?

The Witness: No.

Hearing Officer: Did you ever discipline any employees while you were there?

The Witness: No.

Hearing Officer: Do you attend the Management meetings?

The Witness: No.

XQ. (By Mr. Somers) Are you responsible in any way to [128] Mr. Harvey Berman? A. No, I am not.

Hearing Officer: What benefits do you receive, Mr. Ford?

The Witness: Well, vacation, holiday, and that's it, as a regular employee would.

Hearing Officer: All right, do you have any questions, Mr. Pyle?

Mr. Pyle: No.

XQ. (By Mr. Somers) Do you get Blue Cross-Blue

Shield? A. Recently for a month. It came out about a month ago.

XQ. And...

Hearing Officer: Do the other employees receive those same benefits?

The Witness: Yes, other employees receive those same benefits.

* * *

[134]

Hearing Room 2007-C
JFK Federal Building
Boston, Massachusetts

Friday, April 12, 1968

* * *

[136]

ALONZO MASSEY

was called as a witness by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

Hearing Officer: Give your name?

The Witness: Alonzo Massey.

Hearing Officer: Are you employed at Magnesium Casting?

The Witness: Yes, sir.

Direct Examination

Q. (By Mr. Pyle) What is your address? A. 108 Home-
stead Street, Dorchester.

[137] Q. How long have you been employed at Magnesium Casting Co.? A. 14 months.

Q. And what's your title at the Company? A. As a floor boy.

Q. Floor boy? A. Yes.

Q. Are you also called an assistant foreman? A. To my knowledge.

Mr. Somers: What's your answer?

Mr. Pyle: To his knowledge.

The Witness: To my knowledge.

Hearing Officer: To your knowledge what? What is it to your knowledge, yes or no?

The Witness: No.

Q. (By Mr. Pyle) Does the Company refer to you as an assistant foreman? A. Yes, they do.

Q. Now, in what area of the plant do your work? A. I am on the first floor, the metal line.

Q. Tell the Hearing Officer what kind of work is done in the area where you work? A. What kind of work?

Q. Right. What's the operation. A. Oh, it's all metal, but there are different items.

[138] Q. And what did you do to them in the area where you work? A. I keep the women supplied, and I make sure they are done correctly. If there are any rejects, I take them apart and put them back in the reject case.

Q. All right. Now, which floor of the plant do you work?

Mr. Somers: Objection. Asked and answered.

Hearing Officer: I will allow the question.

Q. (By Mr. Pyle) Tell us again which floor of the plant you work? A. First floor.

Q. And how many other employees work in the same area the first floor where you do? A. There's six as a group. But sometimes I have three or four. They rotate.

Q. In other words, some employees work in your area sometimes, and sometimes they work in Mr. Morris's area? A. Yes.

Q. Now, when the girls or the other employees are working in your area, what are they doing? What job are they doing? A. One assembly and one metal and one pack and sometimes plate.

Hearing Officer: And what items are they assembling?

[139] The Witness: Oh, it would be book ends or calendars, you know, cards, and pen sets, desk pads, and all that.

Hearing Officer: And then they go where do they go from there, to the packer?

The Witness: Yes, first you assemble, you put the pen wheel on first. Then the next girl puts the metal on, and then the next one puts it in the box and puts the label on the box and puts it on a master box.

Q. (By Mr. Pyle) And what work do you perform? A. I keep them supplied, and if they need felt, I give her felt. If one of them have trouble, I am supposed to be there, you know, to try to correct and all that. And I keep checking back and forth on the different girl and make sure she's doing it right.

Hearing Officer: What type of employees have you, male or female?

The Witness: Female.

Hearing Officer: Female assembler and female packer?

The Witness: Right.

Hearing Officer: And what do you do actually? I mean what type of work do you do, if any?

The Witness: I keep them supplied.

Hearing Officer: You just keep them supplied?

The Witness: And I keep checking on them. One day she might pack, and the box would be too heavy for her to move. One girl might run out of felt. She might need glue into the machine. The can [140] is too heavy for her to lift and put the glue in.

Hearing Officer: How are you paid?

The Witness: \$2.35 an hour.

Q. (By Mr. Pyle) Now, aside from supplying the other employees with whatever they need, do you do any work by yourself? A. What do you mean?

Q. When you're not supplying the girls or when you're not moving something for them, do you do any of this packaging or assembly yourself? A. Sometime I might pack.

Q. Now, how long have you been called an assistant

foreman? A. I think about six months. I am not too sure.

Q. Was there any assistant foreman in the area before you were made the assistant foreman? A. Yes, one.

Q. Who was that? A. George Morris.

* * *

[141] Q. (By Mr. Pyle) Now, when you were made assistant foreman, did you get a pay increase? A. Yes, I did.

Q. How much? A. A dime.

Q. Now, since you have been assistant foreman, have you ever fired anybody? A. No, never.

Q. Have you ever suspended anybody? A. No.

Q. Have you ever recommended anybody for a wage increase? [142] A. No.

Q. Have you ever hired anybody? A. No, never.

Q. Now, who makes the work assignments in your area? A. Benny Steinberg.

Q. And how does he do that? A. He puts a poster on the wall every night before the girls go home.

Q. And what does the poster say? A. He puts the number of the item and which operation the different girl is supposed to do. Like at first he has the number of the item 1, assembly, and have a name aside it. The next one felt with her name aside of it. The next one packing with her name aside of it. The morning comes, she goes and does the job, and I am supposed to have the supplies ready.

Q. Does Mr. Steinberg observe you and the other employees working? A. Yes, he does.

Q. How often does he do that? A. About five or ten minutes.

Q. Every five or ten minutes? A. Yes.

Q. Does he watch your work? A. Yes, he does.

[143] Q. Just like the other employees? A. That's right.

Q. Now, if one of the employees in your area wants to leave the plant, who does she talk to? A. Well, sometimes she may tell me, and I will go to Benny Steinberg first and

see what he has to say. Then I have to go back to her and tell her.

Q. Do you instruct any employees on how to do the job?
A. Yes.

Q. And if an employee does the job incorrectly, what do you do? A. Well, I am supposed to correct her on it, and then I will go back to Benny to tell him that she's doing the job improperly and maybe switch her to another job that will be maybe more easier for her.

Q. If Steinberg sees one of the girls doing an operation wrong, does he correct them? A. Yes, he does.

Q. Now, when you run out of work in your area, does Mr. Steinberg assign you to do some other work?

Mr. Somers: Leading. Objection.

Hearing Officer: I will allow the question.

Mr. Somers: Why doesn't he ask what happens when he runs out of work in his area.

Hearing Officer: I said I will allow the question.

Q. (By Mr. Pyle) When you run out of work in your area, [144] what happens? A. When I run out of work, sometimes they go on another floor and do some work or some other odd job may have to be done, and I have to do that.

Q. Who assigns you to that other work? A. Benny does.

Q. Benny Steinberg? A. Yes.

Q. Do you attend weekly supervisory meetings? A. Yes, I do.

Mr. Pyle: I have no further questions.

Cross Examination

XQ. (By Mr. Somers) Mr. Massey, you don't work on the first floor, you work on the second floor, don't you? A. The first floor I am referring to as what we do our work on the line when the work is finished, like I am the first and George the second. Well, the first floor is where all the raw materials come from. So when they get up

there, they have to be sprayed. So I say the first floor and George the second floor.

XQ. But you climb stairs from the ground to get to your ... A. Yes, I do.

XQ. Now, you stated you have three or four employees in your department? A. Not as a group. But that's temporarily. When they rotate it will be three or four.

[145] XQ. You mean they rotate in and out of your department? A. Yes. Maybe switch some day my department, and sometime between the day, they might take one girl from me and put them on to George's floor.

XQ. Would George come to you and say I need one of your employees, can you spare one and you will say okay? A. No, he doesn't come to me and say that. Benny Steinberg always says that.

Hearing Officer: George is who for the record?

The Witness: George Morris.

Hearing Officer: And what's his job?

The Witness: Floor boy.

Hearing Officer: In what department is he in? Is he in the same department?

The Witness: That's another floor. That's the wood line.

* * *

XQ. And isn't it true that Mr. Steinberg has been covering your area for, oh, a very short time? A. Yes, he has.

[146] XQ. Maybe a matter of weeks or a month? A. Yes, he has.

XQ. Mr. Kabilian used to be in charge of your area. He was foreman, isn't that right? A. That's right.

XQ. And Mr. Kabilian in fact gave you much more leeway, isn't that true? A. That was before I was assistant.

XQ. How long have you been an assistant foreman? A. Six (6) months.

XQ. And how long has Mr. Steinberg been there? A. I can't remember how long he's been on that floor.

XQ. Isn't it about a month? A. It could be true.

XQ. Now, isn't it true that your responsibility, among other things, is to keep your people fully supplied so that they are constantly working? A. Right.

XQ. And isn't it true that you check the quality of their work when they finish with it? A. That's right.

XQ. And isn't it true that you have to make a judgment as to whether this work is of the proper quality so that it can be sent to customers? A. Right.

[147] XQ. And if it isn't of the proper quality, isn't it true that you will speak to an employee and show him what's wrong and tell them that this shouldn't be done? A. Yes, I do.

XQ. And if they repeatedly do this, you will go to them and you will tell them to stop doing it? A. Sometimes I go to them, plus I have to go back to Benny Steinberg to tell him.

XQ. Yes, but you yourself will go to the employee on many occasions — most occasions — in fact and tell them to stop doing this, this is wrong? A. Not most occasions, I just go back and tell Benny, and he will have to do something.

XQ. Now, what did you do before Mr. Steinberg came to work? A. Before he came on that floor?

XQ. Yes. A. I was a floor boy.

XQ. Well, didn't you do the same thing, no matter what your title was, whether you were floor boy or assistant foreman, you still did the same thing? A. Same thing.

XQ. Right. But you were told that you were assistant foreman approximately six months ago, isn't that right? A. Yes.

[148] XQ. So that Mr. Steinberg has been there approximately 1 month, so there were about five months you were a . . . A. Yes.

* * *

XQ. (By Mr. Somers) During the period of five months prior to

[149] Mr. Steinberg taking over your area and after you had been informed that you were now assistant foreman, isn't it true that you used to go to some of the women in your department if they made repeated mistakes, and you would tell them you're making repeated mistakes and correct this? A. Yes, Charlie Kabilian was there.

Hearing Officer: You said Bill, I mean, you're referring to . . .

The Witness: I said Charlie Kabilian.

Hearing Officer: And Mr. Kabilian, he's one of the foremen?

The Witness: Yes, sir.

XQ. (By Mr. Somers) Now, let me ask you what area does Mr. Steinberg cover? A. What area?

XQ. Yes, what departments now as a foreman? A. The metal line and the wood line and the stock room and the spray room.

XQ. And this covers a very large area, isn't that true? A. Yes, it is.

XQ. And this is an entire floor of one of the buildings, isn't that true, that he covers? A. No, that's two different floors that he covers.

XQ. It's two different floors that he covers? A. Yes. [150] XQ. And there are approximately 15 employees working in this whole area that Mr. Steinberg covers, isn't that true? A. Yes.

Mr. Pyle: You mean including the . . .

The Witness: Including me.

Mr. Somers: Will the witness be allowed to testify — not the counsel for the Union?

Mr. Pyle: Well, counsel for the Union will clarify where clarification is required, and he will continue to do so.

Mr. Somers: Well, let him clarify either on redirect or by objection.

Hearing Officer: Please, if you have an objection. . .

Mr. Pyle: I think, Mr. Hearing Officer, that the witness should be told whether he's being included in the question or whether he's being excluded in the question.

Mr. Somers: If the witness doesn't understand the question, I think he can state so.

* * *

[151] XQ. And this is spread out over a very large area? In other words, that plant area. . . A. Not that very large. The floor is not that large.

XQ. Well, there are a number of departments? Isn't that true? A. Well, that's just the wood line. And the stock room, that's on the same floor. And on the metal line and the spray booth, that's on the same floor.

XQ. And all three of these areas are divided by walls, isn't that correct? A. Yes.

* * *

[152] XQ. Well, let's take an eight-hour day on an average. How many minutes during an eight-hour day is Mr. Steinberg in your area — in your immediate area? A. Oh, he comes in back and forth.

XQ. Well, let's take the total amount of minutes, can you estimate the total amount of minutes that Mr. Steinberg is in your area during an eight-hour day? A. Oh, it's about four hours, I guess. I am not too exact about it. But he's in back and forth, plus his office is on the same floor.

* * *

[153] XQ. (By Mr. Somers) Since you were first named as an assistant foreman, isn't it true that you have been attending weekly supervisory meetings? A. We don't have a meeting that often. Not weekly. Maybe two weeks or something like that.

XQ. In other words, sometimes they miss a week?
A. Yes.

* * *

[154] XQ. Now, let me see if I can refresh your recollection. Do you recall a discussion concerning Ivory Scott in his threatening to fire an employee? A. Yes, I remember that.

XQ. And do you recall at that time, Mr. Scott was told as well as the rest of you assistant foremen that you in fact have the authority to fire employees? Isn't that true? A. I remember what happened to Scotty. But I can't recollect what was told to us.

XQ. What happened to Scotty that you recall? A. Well, all I know is Scotty and a guy named Washington were having some trouble in a tank room or something like that. But that's all I can remember.

XQ. Don't you recall that Scotty told the man that if he got his coat and left, he was fired? A. Yes, he did say that.

* * *

[155] XQ. (By Mr. Somers) Do you recall Chet Williams or Harvey Berman or both commanding Ivory Scott for taking that situation involving Mr. Washington under his control in doing what he did? A. They could have. I don't know.

XQ. Well, do you recall as a result of this meeting that you were informed that you have the authority to fire your employees if they did get out of hand? Or if they weren't performing up to par? A. Not that I know of. He could have said it, but I don't remember saying anything like that.

[156] XQ. But he could have said it? A. He could have.

XQ. Do you recall any discussion about a smoking problem? A. Yes.

XQ. All right, could you tell us what you remember about

a smoking problem or a discussion concerning that? A. They say if any girl is not supposed to be smoking on the lines, and if a girl gets caught smoking and I tell her to put the cigarette out, if she don't put the cigarette out to come back and let whoever is over me do something about it.

XQ. Isn't it true that when the discussion of the smoking problem came up, you told Management that you would handle your employees, and you would discuss it with them? A. Yes, I did.

XQ. And, in fact, you did go back to your group and you called them together and you told them you didn't want any smoking on the line? A. Not as a group, no. I just told one person.

XQ. You told one person? A. One person because she was caught smoking. She was caught smoking, but I didn't see her. Chet Williams said he seen her. I said if you seen her smoking, why didn't you tell her to put the cigarette out. He said I was standing around, and he wanted me to observe that. So the next day came. I told the [157] girl Chet Williams said he doesn't want any smoking on the line. You can get fired if you get caught smoking.

XQ. That's what you told her? A. Yes.

XQ. And isn't it a fact that Chet Williams told you to be the one to talk to her because he wanted you to be in control of your people? A. Yes, he did.

XQ. Now, do you recall speaking with Chet Williams and with Harvey Berman and asking both of them to keep off the floor because you wanted the direct line of authority as to your people? You didn't want them interfering? A. Oh, that was about a particular job, yes.

Hearing Officer: What was it? Explain for the record.

The Witness: Well, what I took for granted they said I was going to be the assistant foreman, and we were do-

ing a certain item, and I know this is the way it's supposed to be done. I am going to do it this way. And they come around trying to be friendly. And the girl would say, look at this piece here. He's not doing it right because he said he's not doing it right. And Chet says, maybe he's says, no, just do it like this. Do it my way. And so that makes me feel like I am not assistant or whatever they call it.

[158] XQ. In other words, they were under your authority? That's the way you felt? A. Yes.

XQ. And you wanted to be in control of the way those three employees were run? A. That's right.

XQ. So, in other words, since you wanted to take control over that department, you wanted to manage that department yourself because this was your understanding of the authority you had? Isn't that right? A. No, not to my knowledge. I didn't want to manage the whole department.

XQ. No, I mean the three employees — A. Yes, just the employees — the floor.

XQ. Now, haven't you on occasion said to Chet Williams that the girls in your department want more money? Do you recall saying that to Chet Williams or to Harvey Berman? A. No, I don't recall saying that. What I told them was that I wanted more money.

XQ. Did you get it? Did you get more money? A. Yes, I got it. He gave it to me.

XQ. Now, were you asked to fill out a quality check list? A. Yes.

XQ. And when you fill this out, what do you have to do prior [159] to checking in the boxes? A. Oh, I check for oversized holes or clogged holes or oversized felt or thin felt and incorrect screw. I check for that and the correct...

XQ. Is this the insert screw? Is that what you mean?
A. Yes, insert screw, pin wheel screw, too.

XQ. And you check to see if there is proper assembly on a certain part? A. That's right.

XQ. And you check the contents to see that they are all packaged completely? A. That's right.

XQ. And you check the finish? A. That's right.

XQ. And you have to make a judgment as to whether these things are done properly, isn't that right? A. That's right.

XQ. And after you have made that judgment, if the felt is oversized or if the insert screw length is not proper, then you will go to the employee and tell him so, isn't that right? A. No, I would change it. If the felt is oversized, the girl knows that it has to be trimmed, so she'll trim it off.

XQ. So you will go back to her and say this is oversized, I want [160] you to trim it off? A. No, she'll know that it's oversized.

XQ. Well, it gets by her on occasion, I'm sure, and you inspect it? Isn't that right? A. Yes.

XQ. And then at that stage, if it's oversized, you will take it back to her? A. No.

XQ. What do you do? A. The girl packing, she'll trim it. I may have another girl who just trims.

XQ. Oh, so you'll have her do it? A. Yes.

XQ. Isn't it true that you receive approximately 50 cents more than any girls who work under you? A. 50 cents more?

XQ. An hour? A. I don't know how much the girls make.

XQ. Well, you know you receive. . . A. I make \$2.35. I don't know what the girls make.

XQ. You know you make considerably more than they do, don't you? A. Yes, I know I do.

XQ. Can you independently requisition supplies? Can you get supplies for your area? A. Yes.

[161] XQ. Isn't it true that the girls know that they are supposed to take orders from you as to their operation minute-by-minute operation? A. I say sometime they may act like they know, but they don't do it.

XQ. In other words, there are occasions when they are just not doing what you instruct them to do? A. Yes, most of the time. Not occasionally — most of the time.

XQ. Why is that? A. I don't know. I think it's they think I am not there long enough to be an assistant foreman or a foreman or something.

XQ. Well, if you had been there for ten years, maybe they'd look at you differently? A. Yes, maybe so.

XQ. Who else attends these weekly meetings? A. Oh, . . .

Mr. Pyle: He said they were every other week, Mr. Somers.

XQ. (By Mr. Somers) Or every other week, whenever they are held? A. Myself and George Morris and Ivory Scott, Harvey Berman, and Chet Williams, Charlie Kabilian, Benny Steinberg. I think that's about all.

XQ. Mr. Zagrafos attend these meetings also? A. Yes, Ray, he does.

[162] XQ. And during these meetings, you discuss the operations of the plant, isn't that true? A. That's true.

XQ. And you discuss the performance of each area, Mr. Morris's area, Mr. Zagrafos's area, Ivory Scott's area? A. That's true.

XQ. And you discuss the flow of production as to whether everything is coming out properly, the problems that you're having in your department? A. Yes.

XQ. And you discuss the problems with the product as well as the problems with the employee? A. Yes, we do.

XQ. And you may be asked by Mr. Williams or you're asked by Mr. Williams, are your employees following

through on this, or are they keeping at it, are they obeying the rules — things like that? A. They never say obeying the rules.

XQ. Well, he asks whether they are continuing with their production, and they are paying attention to their job? A. Yes, he may ask that sometimes.

XQ. And you will give your opinion as to how your people are doing? A. I give my opinion, yes.

* * *

[164] XQ. (By Mr. Somers) Do you recall about two weeks ago that there was a meeting of the plant managers and general foremen, and you were told to take over during this meeting and the meeting lasted about two hours? A. They had a meeting, but I wasn't told anything. But I observed that myself. I knew they were having a meeting.

XQ. So you took over the area? A. I just kept the women supplied. They know their job. They know what they're supposed to do.

XQ. And made sure everybody was working? A. Yes, I made sure everybody had everything they needed.

XQ. Now, do you recall a discussion at a meeting in which the smoking of Mr. Noiles was discussed? A. Yes.

XQ. And at that time there was a question about disciplining Mr. Noiles concerning his smoking? A. Yes.

XQ. And do you recall that Ivory Scott said that he wanted to handle it on his own in his own way? A. I don't remember how he put it, but I remember Chet saying like that's your best friend.

[165] XQ. Yes? A. And Scotty said, well, you see, you can't go to him this way. You've got to go to him like this, and talk to him that way.

XQ. And who did talk to him, didn't Scott talk to him? A. I wasn't around. I guess he did. I don't know.

* * *

[167] Hearing Officer: Do you punch a time clock Mr....

The Witness: Yes, I do.

Hearing Officer: Do the girls working in the department with you and the other employees working in the department with you punch a time clock?

The Witness: Yes, they do.

XQ. (By Mr. Somers) Does Mr. Steinberg punch a time clock? A. I am not too sure, but I think he does. I'm not too sure.

XQ. What about Mr. Kabilian? A. Yes, he punches one.

Hearing Officer: Do you get paid for overtime?

The Witness: Yes.

XQ. (By Mr. Somers) Does Mr. Steinberg get paid for overtime? A. I don't know whether he's on a straight salary or....

XQ. Excuse me? A. I don't know if he's on a salary or regular time.

XQ. Does Mr. Kabilian get paid for overtime? A. I think so. I'm not sure. I don't know how they get paid.

[168] Hearing Officer: Mr. Somers, previous testimony Mr. Ford was on the witness stand, I think, Mr. Berman also, my recollection is that all the assistant foremen and the rank and file employees enjoyed the same benefits, that is, as far as no pension plan, the pension plan does not apply to the—

Mr. Somers: Does not apply to them, and also . . .

Hearing Officer: To the assistant foremen, nor does it apply to the rank and file employees in the plant and the production and maintenance employees in the plant.

Mr. Somers: Correct, and does not apply to some of the foremen also.

Hearing Officer: And the same applies also as far as the insurance plan that it does not apply to the assistant foremen, nor does it apply to the production and maintenance employees.

Mr. Somers: It doesn't apply to some of the foremen also.

[170]

GEORGE MORRIS

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

Hearing Officer: Would you give the Reporter your name, sir?

The Witness: George Morris.

Hearing Officer: Are you employed at the Magnesium Casting Co.?

The Witness: Yes.

Hearing Officer: And your address is what, sir?

The Witness: 58 Franklin Avenue, Dorchester.

Direct Examination

Q. (By Mr. Pyle) How long have you worked for the Company? A. About maybe 18 months.

Q. And what is your job at the Company? A. Floor boy.

Hearing Officer: What was it?

The Witness: Floor boy.

Mr. Pyle: Floor boy.

Q. (By Mr. Pyle) In what part of the plant? A. Gift line.

[171] Q. And what do you do as a floor boy? A. Well, get the material for the rest of the employees.

Q. How many other employees are there that you supply with materials? A. Maybe three.

Q. Is it sometimes more? A. Sometimes more, yes.

Q. Sometimes less? A. Yes.

Q. What else do you do besides supplying them with the material they need to work? A. Well, I check their work and, you know, go around and see if... how the felt fits and...

Q. That is, you inspect their work? A. Inspect their work, yes.

Q. What else do you do? A. Aside from the line where I am at?

Q. Well, in addition to supplying the girls with work and checking their work, what else do you do? Do you work by yourself? A. Yes.

Q. What's that work? A. Well, maybe I may buff.

Q. And what products are you working on? A. Wood.
[172] Q. Wood? A. Yes.

Q. What are they? A. Pen sets.

Q. Pen sets? A. Pen sets. Pencil caddies, and calendars and desk pads.

Q. And do the other employees in the area where you work assemble and package these items? A. Yes.

Q. Is Mr. Steinberg the foreman in your area? A. Yes.

Q. And does he ever come around and watch the girls working? A. Yes.

Q. Does he watch you work? A. Yes.

Q. How often does he come around and observe the work?
A. Maybe five or ten minutes.

Q. Every five or ten minutes? A. Maybe so.

Mr. Somers: Objection, leading the witness.

Hearing Officer: He asked him how often he came along.

[173] Mr. Somers: And his answer was five or ten minutes, and his remark was every five or ten minutes.

Mr. Pyle: That's obviously what it means.

Mr. Somers: I'm not sure it was obvious.

Q. (By Mr. Pyle) When Mr. Steinberg is watching the other employees working, if they do something wrong, does he correct them? A. Yes.

Q. Have you ever hired any employees? A. No.

Q. Ever fired anybody? A. No.

Q. Ever suspended anybody? A. No.

Q. Ever recommended anybody for a wage increase?
A. No.

Q. Now, how long have you been called an assistant fore-

man by the Company? A. About November I guess—about November.

Q. About November of last year? A. Yes, of last year, yes.

Q. And who was the assistant foreman before you were made assistant foreman? A. No one.

Q. Didn't have any? A. No.

[174] Q. Did you get a pay increase when you became assistant foreman? A. Yes.

Q. How much? A. I got a dime.

Q. A dime? A. Yes.

Q. And what do you make now, \$2.35? A. Yes.

Q. Do you know what the other employees make in your area? A. No.

Q. You don't know what their wage is? A. No.

Hearing Officer: Are they girls that work in the area where you're working?

The Witness: Well, I have the sprayer, you know.

Mr. Pyle: Excuse me just a minute, Mr. Paone.

Q. (By Mr. Pyle) Who assigns work to the employees in the area where you work? A. Benny Steinberg.

Q. And how is that done? A. By putting a note up on the cabinet.

Q. Is that like the note Mr. Massey told us about? A. Yes. Yes.

[175] Q. And that's posted how often? A. Every day.

Q. What time of day? A. Practically about 4:00, 4:30—something like that.

Q. What's quitting time? A. 4:30.

Q. Now, if one of the employees in your area wants to leave the plant, who does she talk to? A. She would talk to me, but I have to go to Benny and tell him that she wanted to leave. And then I would have to come back and tell...

Q. You'd tell her what Benny said? A. Yes.

Q. Do you make out a daily production sheet? A. Yes.

Q. Every day? A. When I don't forget, you know, I make one out then.

Q. You make one out, except when you forget to make it out? A. Yes.

Q. And what happens if you don't make it out? A. Well, maybe the next day, he'll come and tell me that I didn't make the report out.

Q. Steinberg? A. Yes.

[176] Q. Do you attend these supervisory meetings that—I don't know whether we should call them supervisory meetings—but do you attend these meetings every other week that Mr. Massey talked about? A. Yes.

Mr. Somers: I thought you were correct the first time, supervisory meetings.

Mr. Pyle: I don't know. You don't have too many supervisors there.

All right, no further questions.

Cross Examination

XQ. (By Mr. Somers) Mr. Morris, you said that you stated that you attended supervisory meetings. How often are these held? A. Practically every two weeks.

XQ. I see. Now, isn't it true that during these meetings, you discuss the production in your area? A. Yes.

XQ. And you discuss the performance of the employees in your area — how they are doing? A. That would be asked, yes.

XQ. And you discuss the products in your area and how they are coming out, whether they are properly being finished? A. Yes.

[177] XQ. And isn't it true that in one of these meetings, going back to pretty far to late August, you were told at that time that you have the authority over your people, and

you can fire them if they get out of line? A. They said I could fire, but I couldn't unless I had to come to Benny Steinberg or Charlie Kabilian then. But I couldn't fire them.

Hearing Officer: He could not fire them. He said he had to go to Benny Steinberg.

The Witness: Or Charlie Kabilian.

XQ. (By Mr. Somers) In other words, you're saying you could recommend that a man be fired. You could come to Kabilian or Steinberg, and you could say I think that whoever it is should be fired because she's not doing her work? A. I would have to go to Benny Steinberg.

XQ. Right, but you would come to Steinberg, and would make the recommendation? A. That he be fired?

XQ. Yes, isn't that what they were telling you you could do? A. Yes.

XQ. And do you recall a discussion concerning an altercation or a problem that arose between Ivory Scott and William Washington? A. I recall, yes.

[178] XQ. And do you recall that Mr. Scott was commended for taking things into his own hands and telling this Mr. Washington, that if he left, if he put on his coat and left, he was fired? A. I remember that, yes.

XQ. In fact, this was the time when you discussed firing employees, whether you people could fire employees? Do you recall that being the same meeting? A. I don't remember that I discussed, you know, fire an employee on my own. I don't remember that, no.

XQ. But you remember this discussion, though, taking place at a meeting where the assistant foreman and the foreman.... A. I remember what Scott brought up, but I don't remember nothing else.

XQ. But Scott at that time was an assistant foreman, the same as you? A. Yes, that's what he says he was.

XQ. Now, you have three women that work under you, is that right? A. Maybe I don't have three sometimes.

XQ. Sometimes you have more? Sometimes you have less? A. Yes.

XQ. And do you move these women from one job to another, depending upon what your supplies are at that moment?

[179] A. Repeat that again please?

XQ. Do you have to move the women from one job to another, depending upon what your supplies are that you have? A. If they've got something to run, I will have one woman felt and one maybe packing.

XQ. Yes? A. So they just stay in the same position.

Hearing Officer: They stay there all day?

The Witness: As you've got a job, she's got a job felting, unless they run out of work.

Hearing Officer: When they are out of work, what happens?

The Witness: Maybe they'd be shifted around.

XQ. (By Mr. Somers) Now, aren't there occasions when there is a lot of packing to be done, and you will need an extra person on the packing? A. Yes.

XQ. And on those occasions, do you take one woman from an area like felting and put her over on packing? A. Most time I pack.

XQ. I see, but there are occasions when you take another woman to help pack? A. Sometimes, yes.

Hearing Officer: Do you pack every day?

[180] The Witness: Most of the time, yes.

Hearing Officer: You do buffing during the day?

The Witness: Yes, cutting wood, too.

XQ. (By Mr. Somers) Isn't it true that Mr. Kabilian on occasion in the past has helped pack also? A. Packed? You mean wood line?

XQ. Yes. A. Not that I can recall.

XQ. Do you recall Mr. Berman ever helping you with the buffing?

Hearing Officer: Which Berman are you referring to?

Mr. Somers: Harvey Berman.

The Witness: Maybe come by, you know, hit a few strokes.

(Laughter.)

XQ. (By Mr. Somers) How does he do?

Hearing Officer: What would he do?

The Witness: Come out and hit a few strokes.

* * *

[181] XQ. Do you recall Mr. Massey telling Mr. Berman and Chet Williams that he would have better control of his people if they didn't come over into his area because they disturb his own authority? A. Yes.

XQ. And do you recall that you agreed with Mr. Massey on this? A. Yes, I remember. But I recall that they said I was an assistant foreman.

XQ. Yes. A. But when they come around, I don't have no respect, you know?

XQ. So, in other words, you didn't want them coming around because that disturbs your control over your people? A. Yes, I still don't have any control.

* * *

XQ. (By Mr. Somers) Do you recall last week stating that you needed more work on your line because your people weren't busy enough? A. Yes, I remember. Yes.

XQ. And that was at a meeting of the supervisors, isn't that right? A. Yes.

[182] XQ. Now, you fill out a quality check list, don't you? A. Yes.

XQ. And in filling out that list, you have to examine the parts that come out of your department to see that they are properly assembled, they are properly taken care of — properly buffed, isn't that right? A. Yes, right.

XQ. Now, if you should come across, if you should come across as an example a pen set and it hasn't been properly assembled or hasn't properly been buffed, would you go back to the individual and tell them that you want this done correct? A. Well, what I would do I would put it aside, you know. Then maybe if Benny come through, I will let him look at it. And then he'll say, maybe he might say something and send it down, send it on if it's good, you know.

Hearing Officer: But you'd wait for Benny?

The Witness: (no response.)

XQ. (By Mr. Somers) You don't wait for Benny to come in all the time, do you? A. No.

XQ. Have you seen girls making mistakes while they are working? A. Yes.

[183] XQ. What do you do? A. I would stop it.

XQ. You go over to her and what do you say to her? A. I'd say that's the wrong way to do...

XQ. And you'd tell her do it correctly? A. Yes.

XQ. Do they ever talk back to you? A. No, I have no trouble.

XQ. In other words, they know that you're in charge, — and they don't talk back to you?

Mr. Pyle: Oh, I object.

Hearing Officer: Let the witness give the testimony if you will, gentlemen.

XQ. (By Mr. Somers) Isn't that true?

Mr. Pyle: I object. Move that...

Hearing Officer: Do you understand the question, sir?

The Witness: No.

XQ. (By Mr. Somers) The women don't talk to you because they know you're in charge?

Mr. Pyle: I object.

Hearing Officer: Now, you rephrase the question. The

objection is sustained. Do you want to rephrase the question. Go ahead.

You mentioned Benny, were you talking about Kabilian or Steinberg?

The Witness: Benny Steinberg.

[184] Hearing Officer: He's the one that would say leave the desk set there or tell you to bring it back to a girl and have something further done to it or something?

The Witness: Yes.

Hearing Officer: All right.

XQ. (By Mr. Somers) But there are times you do it without Mr. Steinberg coming by? A. Yes, I have done it, yes.

XQ. Do you recall the discussion concerning the smoking problem? A. Yes, I remember.

XQ. And that was at a meeting of the supervisors when that discussion came up, isn't that right? A. Yes.

XQ. And after that meeting, do you recall you went back to your people and told them that you didn't want smoking and a lot of talking going on while they're working? A. Yes.

XQ. Did you speak to them individually, or did you call them together? A. Individually.

XQ. And they knew you were talking with Management's authority when you spoke to them?

Mr. Pyle: I object. He can't testify what somebody else knew.

[185] Mr. Somers: I'll withdraw that.

XQ. (By Mr. Somers) Now; if you run out of stock during the day so that the assignments cannot be carried out because there's nothing to do, what do you under those circumstances? A. If I run out of stock?

XQ. Yes. Do you order more stock? A. Yes.

XQ. All right, now, assuming that there is no more things to be done because the order has been filled, do you have

the employees do something else? A. Give me another job?

XQ. No, do the employees do something, do you have these three employees do something else? A. Benny would have them do something else.

Hearing Officer: What would you do? Go to Mr. Steinberg?

The Witness: Yes.

Hearing Officer: For the record, Benny is Mr. Steinberg, the foreman of the department. You would go to Mr. Steinberg and tell him you're out of work?

The Witness: Out of work, yes.

Hearing Officer: What do we do from here on?

The Witness: Yes.

Hearing Officer: And then he'd tell you all right, we'll start another order?

[186] The Witness: Yes.

XQ. (By Mr. Somers) Then you would come back and tell the girls what's to be done? A. Yes.

XQ. And you would assign the girls to do the jobs? A. No, he would assign them.

XQ. You would inform the girls? A. He would give me the names of the girls, you know.

XQ. And you would go to the girl and tell her what she has to do? A. Yes.

XQ. Do you remember a discussion at one of the supervisors' meetings where there was a question of disciplining Mr. Noiles? A. I can't remember that.

XQ. You don't remember? Do you recall any discussion of Mr. Noiles smoking near the chemicals? A. I don't remember that.

XQ. How often do you buff during the day? A. Maybe I buff a whole day. Maybe I cut wood a whole day. Sand wood a whole day.

XQ. When was the last time you did buffing? A. Friday.

XQ. Friday? A. Yes.

[187] XQ. How long did you buff Friday? A. I cut wood all day. I buffed a half a day, and I cut wood.

XQ. At the same time, were you watching these girls? A. No.

XQ. Did you do any inspection that day? A. Not on the girls, no.

XQ. Was your line operating that day? A. No.

XQ. So this was an unusual situation because your line was down? Your line wasn't operating? A. It was down. No, it was operating, yes.

Hearing Officer: Yes, it was operating.

XQ. Was it operating all day? A. Not all day, no.

Mr. Somers: I have nothing further.

Hearing Officer: Was it operating while you were cutting wood?

The Witness: Yes.

Hearing Officer: How much were you hired at?

The Witness: \$1.75.

XQ. (By Mr. Somers) Who was supplying the girls with work while you were cutting wood? A. I supplied them. Then I went back to cutting wood.

Hearing Officer: You were doing both?

[188] XQ. Who was checking their work? A. No one.

XQ. You mean there was nobody checking that day? A. No.

XQ. Is this proper procedure for your department? A. No.

XQ. Is this the normal procedure for your department? A. No.

Mr. Somers: I have nothing further.

Mr. Pyle: No questions.

Hearing Officer: When you are out, say you want to take a day off, tell me what happens?

How do you go about taking...

The Witness: I have to go to Benny Steinberg or either Chet Williams and tell him.

Hearing Officer: And supposing... That is, when you want to take a day off, you ask them for their permission?

The Witness: Yes.

Hearing Officer: Tell me when one of the girls don't show up, one of your line girls, do they call you, or do they call Mr. Steinberg and tell him they are not coming in the morning?

The Witness: Steinberg.

Hearing Officer: They call Mr. Steinberg.

[189] If one of the girls comes in late, Mr. Morris, do they report to you that they were late, or do they go to Mr. Steinberg or how is that accounted for?

The Witness: Steinberg.

Hearing Officer: They go to Mr. Steinberg. Do you ever recommend any of the girls in the line for an increase in pay?

The Witness: No.

Hearing Officer: Do you check the time cards of the employees in your line there?

The Witness: Do I check it?

Hearing Officer: Yes.

The Witness: You mean do I punch in?

Hearing Officer: No, I say do you check their time cards?

The Witness: No.

Hearing Officer: You don't. Do you know whether Mr. Steinberg checks their time cards?

The Witness: Yes, he checks it.

Hearing Officer: Can it be stipulated that the same benefits that applied to the other assistant foremen are applicable to Mr. Morris?

Mr. Somers: Yes.

Mr. Pyle: Pardon?

Hearing Officer: I asked on the record can it be stipulated the same benefits that are applicable to the other assistant foremen are applicable to Mr. Morris?

[190] Mr. Pyle: I will stipulate the same benefits and the same lack of benefits.

Mr. Somers: I won't stipulate to the latter remark. They do receive the same benefits. He receives the same benefits as the other assistant foremen.

* * *

[191] Hearing Officer: If one of the girls in the line came in, I don't say it happens, but if one of them came in drunk, what would you do?

The Witness: I would have to go to Benny.

Hearing Officer: Mr. Steinberg?

The Witness: Yes.

Hearing Officer: And report it to him?

The Witness: Yes.

Hearing Officer: And let him make the decision?

The Witness: Yes.

* * *

[198]

Hearing Room 2007-A
JFK Federal Building
Boston, Massachusetts
Thursday, April 18, 1968

* * *

[200]

IVORY SCOTT

was called as a witness by the Hearing Officer and, having been first duly sworn, was examined and testified as follows:

Examination

Q. (By the Hearing Officer) Please be seated. Will you give the Reporter your name, is? A. Ivory Scott.

Q. And your address? A. 3 Nising Court, Dorchester.

Q. Are you employed at Magnesium Casting? A. Yes, sir.

Q. What department are you employed in? A. Electro plating.

Q. What other employees are in the electro plating department besides yourself? A. I have three other men.

Q. Three other men? And they are whom? A. William Washington, Donald Noiles, and Nocero.

[201] Q. Tell me, these are the three that work with you in the electro plating department? A. Right.

Q. And tell me, what do the employees in this department do? Tell the record. A. Donald Noiles is a scratch brusher. Nocero is a scratch usher, and William Washington is a plater-eratch brusheusher.

Mr. Wanger: I'm sorry, Mr. Hearing Officer, I couldn't hear.

Q. (By the Hearing Officer) Scott? A. Donald Noiles is a s Speak a little louder, Mr.

Mr. Wanger: Scratch brusher?

The Witness: Right. Willi? and a scratcher brusher, he's a m Washington is a plater

Mr. Wanger: Thank you. eratch brusher.

Q. (By the Hearing Officer) electro plating department is And the foreman of the

Q. Charlie Kabilian? A. Who? A. Charlie Kabilian.

Q. Tell us how you spend thht.

When do your work, day shiftwork day from the time... [202] Q. And what time is the A. Day shift, right.

Q. And that ends at what timday shift? A. 7:00 o'clock.

Q. 5:00? A. Yes. ? A. 5:00.

Q. All right. Now, will you do from the moment you comll the record just what you until you leave at 5:00? A. I'm at 7:00 in the morning temperatures first. Then I set 00 in the morning I check we start running it through tb my tank for plating. Then utes. Then we start taking it cycle. Then I wait 20 min tank all day dry. out of the tank. Then I run

Q. Will you explain what do all day... A. After taking thyou mean by you run tanks being scratch brushed, put inproduct out of the tank, it's taken out, put in a wetting aold water. Then it's being nt. Then we take it out of

the wetting agent into a dryer. Then we send it out. At the end of the day, I filter the tanks, set up my room for the next morning.

Q. All right. Now, tell me what Mr. Washington does? A. The procedure I do, but only his is in the gold room. It's a gold [203] deluxe. He runs tanks in the morning first off, and he waits 20 minutes until it's plated. Then he takes it out, scratch brushed — same procedure — dry it and send it out. At the end of the day, he cleans his room up, filter tanks and get it set up for the next morning.

Q. Now, will you tell us what Mr. Noiles does? A. Mr. Noiles, he scratch brushes all day until the end of the day; and at the end of the day, he assists me in pumping tanks and making samples of the solution.

Q. And Mr. Nocero? A. Mr. Nocero, he cleans the product out of the tanks. At the end the day, he cleans the product out of the tanks that falls off the racks.

Q. And what does he do during... Does he do the same thing during the day? A. No, he's a scratch brusher during the day.

Q. Are you paid by the hour? A. Right.

Q. And your hourly rate is what? A. \$2.35.

Q. And Mr. Washington paid by the hour? A. Yes.

Q. Do you know what Mr. Washington's rate is? A. No, I don't.

[204] Q.. Do you know what Mr. Noiles's rate... Is he paid by the hour? A. Yes.

Q. Do you know what his rate is? A. No, I don't.

Q. And Mr. Nocero, is he paid by the hour? A. Right.

Q. When did you first start to work for Magnesium Casting, Mr. Scott? A. July of '65.

Q. July of 1965? A. Right.

Q. Tell me, what work have you done since you were first hired in July of 1965? A. I started off just running the tanks when I first started.

Q. In the electro plating department? A. Right. Then I became a scratch brusher about three months later. And then after a year passed, they sent me to MIT for electro plating.

Q. How long did you attend school for electro plating, Mr. Scott? A. Oh, about... I can't recall. I'll say about four months — something like that.

Q. And that was... When did you attend school, after work was it, or... A. Yes, after work.

[205] Q. And how often did you attend, one night? A. Every Tuesday night.

Q. Every Tuesday night? A. Yes.

Q. Tell me, what rate of pay did you start off with in July of 1965?

Mr. Somers: Objection. What's the relevance of what his starting pay was?

Hearing Officer: Objection is overruled.

Q. What rate of pay did you start with? A. About 50.

Q. A dollar fifty? A. Right.

Q. And will you tell us how you went on up to your present rate? When was the next increase in pay you received?

A. A month later.

Q. A month later? A. Right.

Q. And what was that, how much, sir? A. \$1.55.

Q. And when was your next increase? A. About two months later.

Q. And that was what? A. Up to \$1.65.

Q. When was your last increase?

[206] Mr. Somers: Objection. What's the relevance of his last increase?

Hearing Officer: The objection is overruled. I need not tell you that we're in a non-adversary proceeding, and I know you want the Regional Director to have all the information in which to make a proper determination.

Mr. Somers: I think he should have all the relevant information. I don't see that this is relevant.

Hearing Officer: Well, I feel that this is relevant information.

All right, proceed, Mr. Scott.

Mr. Somers: I have an exception to the rule.

Q. (By Mr. Paone) The last increase in pay was that you received... A. A month ago.

Q. And that was how much? A. Ten cents.

Q. Tell us, Mr. Scott, now you told us you started at 7:00 in the morning. Now, how do you know what work to tackle, I mean, as you start in, is there a schedule on the wall? A. Yes. Charlie [207] comes by just before time to go home, and he puts the number that I am supposed to run.

Q. And that is whom, sir? A. Charlie Kabilian.

Q. And he is the foreman? A. Right.

Q. And he puts on the wall in the room where you work... A. Right.

Q. ...what work you're to run through that day? A. Right.

Q. Tell me, about how long has Washington been working with you Mr. Scott? A. Oh, Washington was there before I worked.

Q. He was. And Mr. Noiles? A. I'd say about almost a year.

Q. And Mr. Nocero, how long was he been with you in the electro plating department? A. A year and a half.

Q. Do you punch a time clock? A. Who, me?

Q. Yes. A. Yes.

Q. Do these employees, Washington, Noiles and Nocero punch a time clock? A. Yes.

Q. Tell me, Mr. Scott, one of the employees, say Washington [208] Noiles and Nocero, is not going to show up for work, what procedure does he go through? Does he call in the morning and telephone, who does he talk to tell them

he's not going to be in that day? A. Charlie Kabilian or Chet Williams.

Q. And when one of these employees wants time off that are with you during the day, who would they go to, how would they go about getting the time off? A. Well, he would tell me, he says, "I'm going to leave." Then he'd go and tell Charlie that he's going to leave. He would tell me first that he's going to leave, and then he'd go and tell Charlie Kabilian that he's going to leave.

Q. And Charlie Kabilian told him that the work was too heavy, he couldn't leave, he'd have to stay on the job. Has he ever told him that? A. If the work is too hard?

Q. Yes. A. That he could leave?

Q. Say he needed him on the job, I mean, would Kabilian tell him that, I mean, that he couldn't leave the time off or what?

Mr. Somers: Objection. This is conjecture — has he ever heard this discussion? We haven't established whether he's ever heard this discussion.

[209] The Witness: I have never heard it before.

Q. (By the Hearing Officer) Well, let's put it this way. When one of the employees — strike the question. When your out sick, Mr. Scott, are you paid for the time off? A. No.

Q. When the employees are out sick, either Washington, Noiles or Nocero, are they paid while they're out sick? A. No.

Q. Do you have a pension plan at the shop? A. No.

Q. Well, it has been stated here on the stand here by Mr. Berman that there is a pension plan at the shop. Now, my question to you, are you covered by the pension plan? A. No.

Q. Do you know if any of these employees, Washington, Noiles or Nocero, any of the employees are covered by the pension plan? A. No.

Q. That is, they are not covered? A. They are not.

Q. What benefits do you receive, Mr. Scott? A. Blue Cross Blue Shield.

Q. And when did you start to receive Blue Cross Blue Shield? A. About two months ago.

[210] Q. Prior to that, did you have any other insurance coverage that you know of? A. No.

Q. The answer is no? Any of the employees have any coverage as far as you know? A. No.

Q. How about a vacation plan, do they have one at the shop, Mr. Scott? A. Vacation plan?

Q. Yes. A. Not that I know of.

Q. Now, do you get any vacation? A. Yes.

Q. Please? A. Yes.

Q. What vacation do you get? A. Two weeks in July. Two weeks of July.

Q. Is it a paid vacation? A. Yes.

Q. And how about the other employees, Washington, Noiles and Nocero? A. Yes.

Q. Do they receive... A. Yes.

Q. ...the same vacation that you receive? A. Yes.

[211] Q. Do you have a title, Mr. Scott? A. Title?

Q. Do you understand the question? Are you classified with a title in the shop? A. No.

Q. Do you understand the question? A. Yes, I do.

Q. Do you have any authority to hire employees? A. No.

Q. Do you have any authority to fire employees? A. No.

Q. Do you have any authority to suspend any employees? A. No.

Q. Do you have any authority to lay off any employees? A. No.

Q. Do you have any authority to recall or promote any employees? A. No.

Q. Do you have any authority to discipline employees? A. No.

Q. Do you have any authority to adjust any grievances of employees? A. No.

Q. Have you ever interviewed any employees for work? A. No.

[212] Q. Now, you stated that Mr. Kabilian, the foreman, puts the work that's to be run out on an assignment sheet and the assignment sheet is on the wall and you work from that assignment sheet? A. Right.

Q. Now, can you tell me when work runs out, what happens if any work runs out that's on that assignment sheet? What happens then? Do you go to Kabilian for further work, you tell us what happens? A. Right. I go to Charlie Kabilian for further work. Right.

Q. And tell — he'll tell you what other jobs to run through is that it? A. Right.

Q. Now, these tanks that you were talking about, I understood you to say you take the products out of the tank? A. Right.

Q. These products what are they, ashtrays and desk sets? Is that what it is? A. Right.

Q. And you take those out manually, is that it? A. That's right.

Q. And that's the type of work that you do day in and day out? A. Right.

[213] Q. And Washington does similar work? A. Yes.

Q. Have you ever recommended anyone of these employees for a raise in pay, Mr. Scott? A. Yes, I have.

Q. And tell us what took place? A. Well, I recommended Donald Noiles. He wanted a raise. So I went and told Charlie that Donald wanted a raise. Charlie Kabilian.

Q. And then what happened? A. He received it.

Q. He received the raise? A. Yes.

Q. Is there anybody else that you know of that you have asked Charlie Kabilian, the foreman, a raise for any of the other employees? A. No.

Q. Did you ever transfer any of the employees that work with you in the electro plating department, Mr. Scott?

A. No.

Q. Do you have the authority to transfer any of those employees that work with you? A. No.

Q. Do you know, Mr. Scott, what the policy is with respect to employees in the department, I mean, as far as wage increases? [214] Do you understand the question?

A. No, I don't follow you.

Q. All employees start at a certain rate of pay, do they? A. (No response.)

Q. Do you know? A. I don't know, no.

Q. You don't know. Do you know whether if an employee starts at one rate and then after one month he gets another rate, after three months he gets another rate, do you know?

A. No.

Q. You don't. Do you wear work clothes out in the shop the same as Mr. Washington and Noiles and Nocero, Mr. Scott? A. Yes.

Q. Do they have Management meetings at the shop, Mr. Scott — supervisors' meeting? A. Yes, they do.

Q. Do you attend the meetings? A. Yes, I do.

Q. How often do you attend the meetings? A. Every week. Every week.

Q. Will you tell the record just what takes place at these meetings that you attend weekly? A. We talk about the quality of the [215] work and quality control, how we're working.

Q. How often does Mr. Kabilian come into the shop there in the electro plating, Mr. Scott? During the day? A. Not much. Not much.

Q. Well, how often would you say? A. Well, the longest — the only time he comes in is to come in to get racks, you know, to take out so the product can be racked on.

Q. If he has some instructions, he leaves them with you

at that time? A. The only time he instructs me is when we're running specials — a special product, yes, he'd tell me.

Q. Do you — Washington does similar work that you do? A. Right.

Q. During the day. Now, does anyone inspect his work, check the work that Washington does? A. They have a lady outside. She checks his work before it's sent upstairs.

Q. I see. So all these products after they are taken out of the tanks by yourself, by Washington and the work that the other gentlemen, Noiles and Nocero do on these products, they proceed from the electro plating department. They go out to the packaging department? A. Right.

[216] Q. And the girls that are working out in the packaging department, if they note some — something strange on the one of the products, they put it aside? A. Right.

Q. And they will take it up with whom? A. Well, they will see Charlie. He'll come in and tell me.

Q. When an employee wants time off, Mr. Scott, you have to — Can you grant the time off without discussing it with Mr. Kabilian or Mr. Williams? A. No.

Q. Can you excuse any of the employees if he comes in late, Washington come in late? A. Well, I never did it.

Q. I say can you excuse them for coming in late? A. I really don't know.

Q. Has anyone, Mr. Williams or Mr. Kabilian or Mr. Berman or any of the high level supervision there, ever told you that you had authority to hire or fire any employees? A. Well, he told me to get rid of them.

Q. Who told you? A. Chet and Harvey.

Q. Tell us what happened. A. He told me if I didn't want a man to get rid of him in the room. It wasn't fire. He didn't say that. He said get rid of him.

Q. Okay.

[217] Hearing Officer: I don't have any further questions at this time.

Do you have any questions?

Mr. Wanger: A few further questions.

Cross-Examination

XQ. (By Mr. Wanger) Mr. Scott, when were you made an assistant foreman—so-called? A. I can't recall when it was.

XQ. Was it a year ago? A. Approximately, yes.

XQ. Approximately a year ago? A. Yes.

XQ. And in all that time, is it as you have told us today, you have made one so-called wage recommendation? A. Yes.

XQ. And taken no other action? A. Yes.

Mr. Somers: Objection. I don't think that's his testimony that he's taken no other action.

Mr. Wanger: Let me clarify that.

Hearing Officer: The objection is overruled.

XQ. (By Mr. Wanger) Mr. Scott, with reference to your last wage increase, I think you testified that you're currently receiving \$2.35? A. Right.

[218] XQ. And that you had received a ten-cent wage increase? A. Right.

XQ. When did you receive that? A. About a month ago.

* * *

XQ. Now, when you received that wage increase, did to your knowledge other employees receive a wage increase?

Mr. Somers: Objection. Now what's the relevance of this?

Hearing Officer: I will allow the question. The objection is overruled.

A. Just me and Donald Noiles.

XQ. So that it's fair to say that prior to the middle of March, you were receiving \$2.25? A. Right.

[219] XQ. And, if you know, do you know the wage rates of the employees in your department? A. No.

XQ. At that time? A. No.

XQ. Now, the Hearing Officer asked you about an instance wherein an employee would want some time off. Now, I think you testified that the employees would come to you, but then would have to go and ask Mr. Kabilian? A. Right.

XQ. So that Mr. Kabilian has final say as to time off? A. That's right.

* * *

XQ. Now, Mr. Scott, with respect to the one instance wherein you recommended a wage increase, that was for Mr... A. Donald Noiles.

XQ. And that was approximately when, if you can remember? [220] A. The same time that I had a raise.

XQ. Well, I am interested in the time sequence. You went to who, Mr. Kabilian? A. Kabilian, right.

XQ. And told him that this fellow wanted an increase? A. Right.

XQ. And when did he get the increase? A. The same time that I got mine.

XQ. He got it the same day that you got yours? A. Right.

XQ. Now, Mr. Scott, with respect to the Hearing Officer's questions regarding the so-called Management meetings, isn't it true that these meetings that you attend are restricted to your particular department? A. Right.

XQ. They are not general meetings? A. No.

XQ. They are departmental meetings? A. Yes.

XQ. And you attend solely the meeting with respect to your department? A. That's right.

Mr. Somers: What department are we talking about?

The Witness: The plating department.

Hearing Officer: The plating department. The plating [221] department is one of the departments of the products department Mr. Scott?

The Witness: Yes.

Mr. Wanger: At this time, I have no further questions. But I would like to reserve my right to take it up again.

Hearing Officer: Mr. Somers?

Cross-Examination

XQ. (By Mr. Somers) Mr. Scott, isn't it true that there are people outside of the plating department who participate in these management meetings? A. Outside of the plating department?

XQ. Right. Isn't Mr. Massey at these meetings? A. George and Alonzo, yes.

XQ. Massey and Morris? A. Yes.

XQ. And they are not in the plating department, are they? A. No.

XQ. They are in the products division? A. Right.

XQ. So that, in fact, these Management meetings are not the plating department, but they are the whole products division, isn't that right?

Mr. Wanger: If you know.

A. Yes, if I know, yes.

[222] XQ. Well, isn't that true that it's the whole product division that's present, the assistant foremen, the foremen, Mr. William and Mr. Berman? A. Oh, yes.

XQ. Right. Now, when you recommended an increase for Mr. Noiles, isn't it true that you said Mr. Noiles should receive the increase? A. Yes, I did.

XQ. And he received the increase? A. He did, yes.

XQ. Now, do you recall the incident when Mr. Washington — with Mr. Washington, at which time you told him if he put his coat on and left the plant, he was through? A. Yes, I did.

XQ. And why did you tell him that? A. Because he didn't want to help me.

XQ. And what happened when you told him that? A. He pulled his coat off, and he came back.

XQ. How many people do you have charge of in your area? A. Well, I have only two now because Nocero is phosphating.

XQ. Normally what would you have, three? A. Right.

XQ. And you're responsible for seeing that the flow of production in your area is running smoothly, isn't that right? A. That's right.

[223] XQ. And you go to these Management meetings, and you're asked how your production is coming in your area? Isn't that true? A. That's right.

XQ. And you're asked how the employees in that area are operating, whether they are doing their job, isn't that right? A. That's right.

XQ. And if there are any problems, you will tell the people present at that meeting what your problems are with those individuals, isn't that right? A. Say that again.

XQ. If you're having any problems with any of these three people who are working under you, you will at that time inform the people present of what your problem is, isn't that right? A. Well, most of the time we go to Charlie Kabilian — most of the time.

XQ. In other words, if you have a problem with the three people working under you, you will go to Mr. Kabilian? A. That's because they won't listen to me. They'd rather listen to Charlie.

XQ. But you're in charge of those three people, aren't you? A. That's right. I'm supposed to be, yes.

* * *

[224] XQ. Let me ask you this, do you recall a meeting with Noiles and Benny Steinberg and Chet Williams and yourself in which you discussed the fact that Noiles was complaining that Steinberg wasn't talking to him? A. Oh, yes, yes.

XQ. And at that time, do you remember that Chet Williams stated in front of all those people that you were run-

ning that room, and that you had charge over Noiles? A. Yes, I do.

XQ. This was about two or three months ago, isn't that true? A. Yes.

XQ. Now, also at these Management meetings, you talked about the quality of the work coming out of your area? Isn't that right? [225] A. Right.

XQ. And you talked about quality control? A. Right.

XQ. In fact, you fill out a quality control sheet, don't you? A. Yes, I do.

XQ. And what do you have to do in order to fill that out? A. I check the quality control list every hour.

XQ. I see. And you make a judgment as to the quality of that product? A. Right.

XQ. And you're the only one in your area that does that, isn't this true? A. Raymond Zagrafos is supposed to be doing it, but...

XQ. And he's an assistant foreman also, isn't he? A. Yes.

XQ. But Washington doesn't fill that out, does he? A. No.

XQ. And Noiles doesn't fill it out? A. No.

XQ. And Nocero doesn't fill it out? A. No.

XQ. Now, who are you directly responsible to? A. What do you mean?

[226] XQ. Who's above you? A. Charlie.

XQ. Charlie Kabilian? A. Right.

XQ. How much does Mr. Kabilian know about electro plating? A. I don't think he knows anything.

* * *

XQ. (By Mr. Somers) Certainly you know more about electro plating than the three people working under you, don't you? A. Yes.

[227] XQ. Now, when you check items that come out of the degreaser, aren't you checking, in addition to other things, aren't you checking for darkness in the oxidizing? A. Right.

XQ. And if it's unduly dark, then you'll go to the person who's doing the scratch brushing on that item. . .
A. No, I would change the oxide.

XQ. You will change the oxide? A. Right.

XQ. And who works with the oxide? A. Donald. Donald Noiles.

XQ. Will you show him that item that it's coming out dark? A. Yes, I would.

XQ. Would you tell him to watch it the other items to see that they don't have this problem? A. Yes.

* * *

[228] XQ. (By Mr. Somers) Do you recall a discussion during a Management meeting of the discipline of Mr. Noiles for smoking? A. Yes.

XQ. And what was he doing, smoking near the chemicals? A. Yes, he was.

[229] XQ. And how was that handled? A. Well, I went over and told him, I said to stop smoking because one ounce of cyanide would kill him.

XQ. I see. Now, prior to your going over discussing this with him, was there a discussion at one of the Management meetings concerning this? A. Yes, there was.

XQ. And at that time, didn't you say that you'd handle this in your own way? A. Yes.

* * *

[230] And after you have filled the tanks first with 1221, and there is still room in the tanks, don't you decide which items you're going to put in besides the 1221? A. Right.

XQ. So that's up to you? A. That's right.

XQ. So you are, in fact, deciding which items are being ran in addition to that specific item? A. After I put the 1221 in, yes.

* * *

[231] XQ. (By Mr. Somers) You did recommend that people be allowed to work overtime in your area? A. Yes.

XQ. Did you work overtime? On those occasions?
 A. Yes.

Hearing Officer: Who is it that decides the work overtime, Kabilian, isn't it, who will decide what overtime is to be done in the department, Mr. Scott?

The Witness: Yes.

XQ. (By Mr. Somers) So on the line of command, as I understand it, Mr. Scott, is from Kabilian, who is your foreman, who you're responsible to is that right? A. Right.

XQ. To you as assistant foreman, and you have charge of the three people in your department, is that right? A. I'm supposed to, yes.

* * *

[233] XQ. And when Mr. Kabilian comes in, and isn't it true that he will ask you many questions about electro plating? A. Sometimes, yes.

XQ. Because he's not familiar with it? A. Yes.

* * *

[234] *Recross Examination*

XQ. (By Mr. Wanger) Mr. Scott, in answer to my brother's questions, you said at one point that you're supposed to be in charge of these men? A. Yes.

XQ. You did say "supposed?" That would indicate some doubt on your part at times?

Mr. Somers: Objection — leading.

Hearing Officer: I will allow the question. The objection is overruled.

A. Yes.

XQ. With respect to the smoking incident near the cyanide... A. Yes.

XQ. Mr. Noiles, was it? A. Yes.

XQ. . . . refused to stop smoking, you would have to see Kabilian, is that right? A. Yes.

Mr. Somers: Objection — leading.

Hearing Officer: I will allow the question. Objection overruled.

Mr. Somers: I have an exception.

[235] XQ. (By Mr. Wanger) Now, with respect to the incident wherein Noiles wanted a wage increase, is it a fact that you went to Kabilian and told him that Noiles wanted a wage increase? A. That's right.

XQ. By the way, Mr. Scott, who's taking care of that department today? A. Willy Washington and Nocero.

XQ. So these are the only people in the department today? Is that right? A. Donald is in, but his back is injured.

XQ. They are performing all the duties that are normally performed in that department? A. Right.

XQ. Including yours? A. That's right.

Mr. Wanger: No further questions.

Recross Examination

XQ. (By Mr. Somers) Mr. Scott, when you had the problem with Willy Washington, you didn't go to Mr. Kabilian, did you? A. No, I didn't go to anyone.

XQ. Right. Right on the spot you told Washington if he put his coat on and left, he was through, didn't you? A. That's right, but he didn't leave.

* * *

[237] *Further Recross Examination*

XQ. (By Mr. Somers) Does Mr. Washington plate as much as you [238] do? A. No, he don't.

XQ. He probably does about ten percent of the volume that you do, isn't that true, in plating? A. That's right.

* * *

RAYMOND ZAGRAFOS

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined and testified as follows:

[239] Hearing Officer: Please be seated. Give the Reporter your name and address?

The Witness: Raymond Zagrafos, 11 Westville Terrace, Dorchester.

Direct Examination

Q. (By Mr. Somers) Mr. Zagrafos, you're employed by Magnesium Casting Co.? A. Yes.

Q. How long have you been employed there? A. Nine months.

Q. And what's your title? A. Assistant foreman.

Q. Where? What department? A. In the buffing department.

Q. And is the buffing department part of the products division? A. Yes.

Q. Now, do you attend meetings weekly or bi-weekly? A. No, weekly.

Q. Weekly meetings? And who else attends these meetings? A. Scotty does.

Q. That's Ivory Scott? A. Yes. Al does and George.

Q. George Morris, Alonzo Massey? A. Right.

[240] Q. Could you give their full names? A. I didn't know their last names. I'm sorry.

Q. Who else attends? A. Chet Williams does, Charlie Kabilian does. Benny Steinberg and Harvey Berman.

Q. Now, do you recall during any of these meetings your duties being outlined to you? A. Yes.

Q. And were these duties outlined only as to you, or were they outlined as to others who were present? A. They were outlined to the assistant foremen who were there.

Q. Who are those people that you're talking about?
A. Ivory Scott, George Morris and Al.

Q. Al Massey? A. Right.

Q. Now, would you tell us who spoke and who outlined these duties? A. Both Harvey and Chet.

Q. And what did they say? A. Well, they told us in regards that we had the power if somebody was drinking if they were constantly coming in late or absent without an excuse or not doing as they are told, that we could dismiss them.

Q. What else did they say you could do? Did they outline your [241] responsibility with regards to the people working in your department?

Hearing Officer: I wish the record would reflect who gave this outline.

Q. Who spoke and gave that outline? Who told you all this? Who told you all these things? A. I can't remember. It was either Harvey or Chet.

* * *

Q. Now, how many people do you have in the buffing department? A. I believe ten.

Q. And in the buffing department, how many assistant foremen are there? A. In the buffing department?

[242] Q. Yes. A. Just myself.

Q. I see. Now, these ten include you? A. Yes.

Q. What do you do with regard to the day-to-day operation insofar as those other nine employees are concerned? A. Well, I make sure they are supplied. That's the first thing I do in the morning. I go upstairs and I get them their gloves, cotton gloves, anything else they need. I assign them to their work, which machines to go on during the day. And what we're doing to work on for the day.

Q. And what percentage of the time would you say that you actually perform production work? A. About ten percent.

Q. And what about the other 90 percent, what are you doing? A. Well, ten percent of the time I'm working, I'm on a wheel.

Q. Yes? A. Another ten percent I may be getting stock, and about 80 percent of the time I'm supervising.

Q. Now, have you ever recommended people for wage increases? A. Yes.

Q. Do you recall how many people or who they were? [243] A. Three people.

Q. Who are they? A. Michael Hastings, Otis Singleton, and one person I don't recall his name at all. All I know him is by Mousy.

Mr. Berman: Mousy for the record is Constantine Malonowski.

Q. Now, do you recall taking the names one by one, what did you do on Hastings with regard to the recommendation? Who did you go to? A. I went to Benny Steinberg.

Q. And what did you say to him? A. Well, I told him that Michael was doing good work on highlighting. He was one of our highlighters. And I believed he deserved the job for the quality of the work he was doing.

Q. Deserved what? A. He deserved a raise.

Q. Did he get a raise? A. Yes.

Q. Do you remember how long after you made the recommendation he got the raise? A. Two weeks.

Q. Did anyone ask you any questions about Hastings after that? [244] A. No.

Q. What about Singleton? A. Just about the same. He's also a highlighter.

Q. And who did you go to on that occasion? A. Bernard Steinberg.

Q. And what did you say at that time? A. Just about the same. What I said about Hastings.

Q. Did he get a raise? A. Yes.

Q. Do you recall how long after you made the recommendation he got the raise? A. About the same length of time.

Q. Do you recall when you recommended Hastings for a raise, how long ago it was? A. No.

Q. Well, was it three months ago, four months ago, a couple of weeks ago? A. It was about four months ago.

Q. About four months ago?

Hearing Officer: When?

The Witness: About four months ago.

Q. Do you recall when you made the recommendation for Singleton? A. It was about two weeks later.

Q. And what about Malonowski, do you recall when you made [245] that recommendation? A. It was about five months.

Q. Five months ago. A. Right.

Q. I see. And who did you go to on that occasion? A. I went to Harvey Berman.

Q. And what did you say? A. Well, I told him that Mousy was doing good work.

Q. Yes? A. And that he hadn't received a raise in a while. And I told him, you know, at that time he should get one.

Q. Did he get a raise? A. Yes.

Q. Do you remember how long after you made the recommendation he got the raise? A. One week.

Q. Have you ever had employees request. . .

Mr. Wanger: I'm sorry. I didn't hear the answer to that question.

Mr. Somers: One week.

Q. (By Mr. Somers) Have you ever had employees ask you if they could leave for the day? A. Yes.

Q. And what happened on those occasions? A. Well, I have [246] had Otis came up to me yesterday. He had the

hiccupps, and he couldn't stop. He couldn't stop hiccupping. So I excused him for the day.

Q. Have you had it happen before? A. Yes.

Q. And what have you done on those occasions? A. I have let him go.

Q. Did you see anybody prior to letting him go?
A. No.

* * *

[247] Q. Now, have you ever fired an employee? A. Yes.

Q. Who was that? A. Frank Angrasio.

Q. And how long ago was this? A. About four or five months ago.

Q. Why was he fired? A. He was buffing downstairs, and he left without telling either myself or Benny Steinberg that he was going up. And he just left his department, he walked away and didn't tell anybody, and he stayed upstairs.

[248] Q. I see, and what happened? A. I went upstairs and he told — and I told him if he didn't come back downstairs, I was going to fire him. So I fired him. He refused to go back down.

Q. How long ago was this? A. It was either four or five months ago.

Q. You attend these supervisory meetings on a weekly basis? A. Yes.

Q. What is discussed at these meetings? A. Quality of work, once in a while we discuss the employees.

Q. What do you discuss when you discuss the employees? A. Well, we maybe discuss somebody who isn't working too well; or if we have a problem, we'll discuss the problem.

Q. Do you discuss the performance of the individual employees? A. Once in a while.

Q. Do you discuss the flow of production? A. Yes.

Q. In your area? A. Yes.

Q. Have you ever transferred an employee from one job to another? A. Many times.

Q. In the course of the day, do you do this? A. Yes. [249] Q. Every day? A. About three or four times out of a week I will have to change them.

Q. I see. Have you ever transferred an employee between the buffing department and the plating department? A. Yes.

Q. Who was that? A. Noocero.

Q. And how is that done? A. Well, I would go in and I'd ask Scotty if he needed him.

Q. Yes? A. If not, could I take him and put him in back for phosphating.

Q. And what happens? A. Well, if he needed him in there, he didn't go back phosphating. If he didn't need him, I'd take him out and put him in the back.

Q. Would Scotty go to somebody before he'd give you an answer? A. No.

Q. Have you had — strike that. Do you check the work of the employees working under you? A. Yes.

Q. And what do you do when you check it? How is that done? [250] A. Well, I will go over at random, and I will pick up a few of the pieces at random, check it out, and see how, you know, how they are doing. Either it may be buffing an article, or they may be cleaning it.

Q. And you — if you find any problem with that item, what will you do? A. I will tell the employee about it, and have him correct it.

Q. Do you assign the employees to the particular jobs? During the day? A. Yes.

Q. Now, you stated that your duties were outlined during the Management meetings. In the outline of your duties, did that also include your day-to-day function with regard to the employees? Working under you? What you were

supposed to do with regard to those employees? A. I don't understand the question. I'm sorry.

Q. Were you told that you were in control of the employees in your area? A. Yes.

Q. And were you told that you had any responsibility for them? A. Did I have . . . any responsibility?

Q. Were you told that you did have responsibility for them? [251] A. Yes.

Q. Was this repeatedly emphasized to you as to what your responsibilities were — to you as well as to the other foremen — during these meetings? A. Yes.

* * *

Q. Now, is there a work schedule put up by Mr. Kabilian in your department the same as in the other departments? As to what is [252] going to be run the following day, sir? A. He puts up what we want run first.

Q. What he wants run first, is that it? A. Right.

Q. And that schedule is put up on the wall? A. It's put up in every department, yes.

Q. And you follow that schedule? A. Right.

Q. What's your rate of pay paid by the hour? A. \$2.35 an hour.

Q. \$2.35. Do you punch a clock? A. Yes.

Q. How much did you start out at? Did you say you were hired nine months ago? A. Yes, sir.

Q. And what was your rate? A. I believe it was either a dollar. . .

Mr. Somers: Objection.

Hearing Officer: Overruled.

Q. Your rate was what? A. It was either \$1.75 or \$1.80.

* * *

[253] Q. (By the Hearing Officer) About five months ago? Do you punch a clock? A. Yes.

Q. Do the other employees punch a clock in your department? A. Yes.

[254] Q. You stated about ten of them? A. Yes.

* * *

Q. From the time you punch in at 7:00 o'clock in the morning just what you're doing? A. When I first go in, I go upstairs. I get the gloves for them. I make sure they have enough trucks downstairs, so we can put the articles on it to send the product upstairs. We put them on racks, you know. It's on the truck and the racks are on it. And we send it upstairs. I make sure they have enough racks downstairs. And I assign the employees to their machines, which machines they are going to work on for that day. And if we have anything special, a lot of times I will do it myself. I will either buff it or clean it, whichever has to be done on it. I make sure all the racks have gone into the plating room. I check the rack in the plating room to make sure we keep it full. This is in Scotty's department. We send the work into his room. [256] At the end of the day, I shut out all the lights. I shut the degreaser off. That's about it.

* * *

[257] Hearing Officer: All right, Mr. Wanger.

Cross Examination

XQ. (By Mr. Wanger) Mr. Zagrafos, you testified that with respect to wage recommendations, you made three of them? A. Yes.

XQ. And you further testified it took two weeks in two instances for those increases to be effectuated? A. Yes.

XQ. Is that because the higher echelon personnel of the Company had to check on the employee you recommended? A. No, sir.

* * *

[261]

Redirect Examination

Q. (By Mr. Somers) Mr. Zagrafos, does Mr. Kabilian punch a time clock? A. Yes.

Q. Do you know whether Mr. Steinberg does? A. Yes.

Q. Does he? A. Yes.

Q. And do you know what your pay is in relation to the other employees working under you, what the differential is? A. Yes.

Q. How much is that? A. About 50 cents.

Q. About 50 cents? A. Yes.

[262] Hearing Officer: About 50 cents between whom and who?

Mr. Somers: Between he and the other employees working under him.

* * *

Q. (By Mr. Somers) Do you recall attending any policy meeting with Management regarding drinking problems in the plant? A. Yes.

Q. Can you say what occurred at that time? A. Well, we had a situation where some of the employees were bringing in bottles and drinking. So we were informed that...

Q. Who was present? A. Who was present?

Q. Yes. All of us.

[263] Q. Well, who is...

Hearing Officer: Who is all of us?

Q. The same group that you mentioned as being in the supervisory meetings previously? A. Right.

Q. How long ago was this meeting? A. I can't recall.

Q. Was it within the last two months, three months? A. Within the two months.

Q. All right. Continue. Tell us what happened? A. We were told about the situation of drinking, that somebody was found with a bottle on them. I don't recall who it was. And that this couldn't continue because it was a bad

reflection on everybody; and that if anybody was caught drinking again or with a bottle, I should say with a bottle on the premises, they were to be let go immediately.

Q. And was this policy set during the meeting? A. Yes.

Q. After was there a discussion with all of you? A. Yes.

Q. Did you participate in that discussion? A. Yes.

Q. Did Mr. Massey participate? A. I believe so.

[264] Q. Mr. Morris? A. I believe we all did.

* * *

[265] *Further Examination*

Q. (By Mr. Paone) Three employees received raises? Did they come to you first and ask you for a raise? A. Yes, sir.

Q. And what did you tell them? A. I didn't tell them anything. I said I'd see what I could do.

Q. Did you tell them that you'd talk to Mr. Steinberg about it? A. No.

Q. You mean — What do you mean when you told them you'd see what you could do? A. Well, what I mean was I'd tell Benny about their performances, Benny being Mr. Steinberg, and you know, I'd ask for them to be put in for a raise.

* * *

[267] Q. Tell me, what did — You went to Steinberg and mentioned [268] to him about these that wanted raises? A. Two.

Q. Two? A. Yes.

Q. Wasn't it three? Who was the third one? Who did you go to for the third one? A. Harvey Berman.

Q. And that was for the . . . A. That was for Mousy.

Q. The floor boy? A. Yes.

Q. How come you went to Harvey for the floor boy and not Mr. Steinberg? Does he come under Harvey's jurisdiction . . . A. I imagine he does, yes.

Q. And what did Mr. Berman tell you — Mr. Steinberg tell you? A. What did he tell me in regards to the raises?

Q. Yes. A. He told me he was going to put in for them.

Q. Did he tell you how much? A. No. I asked him for a dime. I asked him for, if — at the time I believe it was Hastings — could receive a dime more than his pay; and he said he'd put it in for him.

Q. Did he come back to you later — Mr. Steinberg? A. He came back later and told me they had gotten the raise.

[269] Q. Can you tell me in your department if one of the employees — what's the procedure when one of the employees doesn't want to — has got some personal business to take care of and can't come into work, are they supposed to call in the department and notify the Company that they won't be in that day? A. If they call up that morning, right. That's the procedure.

Q. And generally, who would they call? Who are they to notify that they won't be in for work? A. They will either notify Charlie Kabilian or myself, or they will leave a message right in the office and just call up and tell them they won't come in.

Q. Who will they generally ask for, Charlie Kabilian? A. Either Charlie Kabilian or myself.

* * *

[271] Q. Did he tell you — I'm talking about Mr. Williams now — did Mr. Williams tell you that anyone who, that if anyone of you saw — talking to you people at the meeting, if anyone saw employees with a bottle they were to be reported to the front office? A. No.

[272] Q. What did he say? A. He didn't say it was supposed to be immediately reported to him. What he said

was if we saw anybody with a bottle, that they were supposed to be fired right on the spot.

Q. Did he say who was going to fire them? A. No.

Q. Who? A. The assistant foremen or the foremen or himself, if he caught somebody.

* * *

[276]

Examination

Q. (By the Hearing Officer) ***

[277] Q. Well, I mean, these things that you're working on are things that have been put on — referring to things, it's a schedule that Mr. Kabilian had put up the day before? Am I right? A. Right.

Q. Now, if you finish all the work that Mr. Kabilian has set out on the schedule there before the shift is completed, what happens then? A. What would happen?

Q. Yes. A. Then I would assign more work.

Q. And how would you go about that? Would you go see Mr. Kabilian for another sheet? A. No. I'd start working on something else that would be needed upstairs. Start working on maybe 1311's or 1221's, or I'd start sending in — have the rack up for coasters and inserts.

* * *

[279]

Further Redirect Examination

Q. (By Mr. Somers) In making up this list that's posted in the [280] morning, do you work with Mr. Kabilian? I mean the list that's made up in the evening for the previous day? A. Right.

Q. Do you work with Mr. Kabilian in making up that list? A. I do.

Q. Now, does that list say who's going to work on what item? A. No.

Q. Who decides that? A. Either Charlie or myself.

[287] Mr. Somers: With regard to the Company's position, we take the position that the assistant foremen are supervisors within the meaning of the Act. And we take no position at this time on the record-keeping [288] department, shipping, receiving and truck driver. We will examine the record and determine what position we will take. We may be in agreement with the Union. We may not. As for delay in the hearing, I think the record will show that the Employer completed his case perhaps two weeks ago. At that time the Union requested a postponement to a later date. And we are here today because the Board saw fit to subpoena a man who they understood the Union was going to subpoena previously.

RESPONDENT'S EXHIBIT NO. 1(a)
PLATING DEPARTMENT
QUALITY CONTROL DAILY CHECK LIST

Date 3/18/68

HOUR OF DAY

Problem List	Causes Action Taken					
	4:30	3:30	2:30	1:30	10:30	7:30
1. Blisters	x	x	x	x	x	x
2. Rough Deposit — Heavy Light	x	x	x	x	x	x
3. Color	x	x	x	x	x	x
a. Plating	x	x	x	x	x	x
b. Oxidizing	x	x	x	x	x	x
c. After Oxidizing	x	x	x	x	x	x
4. Stains	x	x	x	x	x	x
a. Spotting	x	x	x	x	x	x
b. Finger Marks	x	x	x	x	x	x
c. Dryer	x	x	x	x	x	x
5. Scratch Brushing	x	x	x	x	x	x

Causes

1. Dirty Castings
2. Improper Temperature
3. Current Off
4. Improper Rinsing
 - a. Before Plating
 - b. After Plating
5. Dirty Gloves
6. Wetting Agent Dirty
7. Oxide Changed when necessary
8. Color sample for Gold and Oxide
9. Dirty Degreaser Dryer

Remarks: Improper temperature on tank #1 at 7:00 A.M. Current off on the soap at 7:00 A.M. (defective fuse) Net castings on some of the work.

RESPONDENT'S EXHIBIT NO. 1(b)
PLATING DEPARTMENT
QUALITY CONTROL DAILY CHECK LIST

Problem List	Causes Action Taken					
	4:30	3:30	2:30	1:30	12:30	10:30
1. Blisters	x	x	x	x	x	x
2. Rough Deposit —						
Heavy Light	x	x	x	x	x	x
3. Color	x	x	x	x	x	x
4. Plating	x	x	x	x	x	x
a. Oxidizing	x	x	x	x	x	x
b. After	x	x	x	x	x	x
c. Oxidizing	x	x	x	x	x	x
5. Stains	x	x	x	x	x	x
a. Spotting	x	x	x	x	x	x
b. Finger Marks	x	x	x	x	x	x
c. Dryer	x	x	x	x	x	x
5. Scratch Brushing	x	x	x	x	x	x
<i>Causes</i>						
1. Dirty Castings						
2. Improper Temperature						
3. Current Off						
4. Improper Rinsing						
a. Before Plating						
b. After Plating						
5. Dirty Gloves						
6. Wetting Agent Dirty						
7. Oxide Changed when necessary						
8. Color sample for Gold and Oxide						
9. Dirty Degreaser Dryer						
Remarks: At 7:00 A.M. a new heater was put in the soap.						

(s) IVORY SCOTT

RESPONDENT'S EXHIBIT NO. 1(e)
PLATING DEPARTMENT
QUALITY CONTROL DAILY CHECK LIST

Date 3/25/68

HOUR OF DAY

Problem List	Causes Action Taken									
	4:30	5:30	6:30	7:30	8:30	9:30	10:30	11:30	12:30	1:30
1. Blisters	x	x	x	x	x	x	x	x	x	x
2. Rough Deposit — Heavy Light	x	x	x	x	x	x	x	x	x	x
3. Color	x	x	x	x	x	x	x	x	x	x
a. Plating	x	x	x	x	x	x	x	x	x	x
b. Oxidizing	x	x	x	x	x	x	x	x	x	x
c. After Oxidizing	x	x	x	x	x	x	x	x	x	x
4. Stains	x	x	x	x	x	x	x	x	x	x
a. Spotting	x	x	x	x	x	x	x	x	x	x
b. Finger Marks	x	x	x	x	x	x	x	x	x	x
c. Dryer	x	x	x	x	x	x	x	x	x	x
5. Scratch Brushing	x	x	x	x	x	x	x	x	x	x

Causes

1. Dirty Castings
2. Improper Temperature Low Temperature #1
3. Current Off
4. Improper Rinsing
 - a. Before Plating
 - b. After Plating
5. Dirty Gloves
6. Wetting Agent Dirty
7. Oxide Changed when necessary
8. Color sample for Gold and Oxide
9. Dirty Degreaser Dryer

Remarks: Low temperature on #1 All day because of bad heaters Tank #2 plating light.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Francis V. Paone, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

The Employer made a special appearance at the hearing, contesting the fact that a hearing was scheduled while a charge in Case No. 1-CB-1362 filed by it alleging a violation of Section 8(b)(1)(A) by the Petitioner was pending and no request to proceed was filed. The Employer premises its argument on Section 11830 of the Board's Field Manual. Said Section deals with concurrent "R" and "C" cases and states that the Board has a general policy of not proceeding in any representation case during the pendency of an unfair labor practice charge affecting some or all of the employees involved in the concurrent petition and where the charging party is also a party to the representation case. The undersigned, prior to the opening of the hearing, denied the Employer's request for a postponement and thereafter the Board upheld this action as a proper exercise of discretion. See *Columbia Pictures Corporation*, 81 NLRB 1313, 1314-15. *St. Louis Cordage Mills*, 170 NLRB No. 7, 67 LRRM 1378, 1379-80.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the

¹ After the close of the hearing, the Employer filed a motion to correct the record. Said motion is granted.

meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

In Case No. 1-CB 1362, the Employer charged, in substance, that the Petitioner through certain supervisors restrained and coerced employees by soliciting them to sign union cards and by distributing union campaign literature among employees. Investigation of these charges disclosed that the alleged supervisors were Obedia Ford and Ivory Scott, two of the individuals whose status is decided in the instant matter. The undersigned dismissed the charges in Case No. 1-CB 1362 on May 8, 1968, on the grounds that the investigation had disclosed that Obedia Ford was not a supervisor and that, assuming without deciding that Ivory Scott was a supervisor, he was not acting as an agent of the Union. On May 21, 1968, the Employer, Charging Party in 1-CB-1362, took an appeal from said dismissal, which appeal is still pending. On April 2, 1968, the Employer requested a continuance of the instant matter pending the investigation of Case No. 1-CB 1362. As indicated above, this request was denied on May 3, 1968, by telegram and the undersigned's action was thereafter affirmed by the Board. In its letter requesting a continuance and at the hearing, the Employer, *inter alia*, contended that the evidence of interest submitted by the Petitioner in the instant case was tainted because of the activity alleged in Case No. 1-CB-1362 and that, therefore, the petition should be dismissed. The showing of interest is a matter for administrative determination and, of course, not litigable. *O. D. Jennings & Company*, 68 NLRB 516.

Based upon a concurrent investigation of the charge in Case No. 1-CB-1362 and of the allegation that the showing of interest was tainted, the undersigned is administratively satisfied that the Petitioner's showing of interest was adequate and not tainted as urged by the Employer.

4. The Employer is engaged in the manufacture, sale and distribution of various desk accessories and related products at its Hyde Park, Massachusetts, plant, where it employs approximately 250 employees in the unit found appropriate herein. The unit description is in accord with the agreement of the parties except that the Petitioner would include seven individuals classified as assistant foremen, the employees of the records-keeping department, the employees of the shipping and receiving department and the truck driver. The Employer would exclude the seven assistant foremen as supervisors and at the hearing took no position with respect to the employees of the records keeping department, the shipping and receiving department and the truck driver. In its brief, the Employer agreed to the inclusion in the unit of these categories of employees and they are so included.

William Adams, Obedia Ford and Norman Sawyer, classified as assistant foremen, work in the die casting department under the supervision of the general foreman, Malcolm Emack. In addition, there are three shift foremen. The record demonstrates that these three employees are hourly paid, punch a time clock and spend the entire portion of their work day operating die casting machines. This work is no different from that of other employees engaged in the operation of similar machines. With the sole exception of receiving ten cents per hour more than other employees in their department, the aforesaid employees receive the same benefits and have similar working conditions as other die casting machine operators. They do not possess any authority to hire, fire, suspend, promote,

transfer or discipline employees, nor do they responsibly direct any other employee or otherwise engage in any conduct which affect the employment status of any other employee in their department. The record does not contain any evidence demonstrating that these individuals possess any of the indicia of a supervisor. It appears that the Employer has abandoned contest of this issue in its brief, arguing *only* the status of assistant foremen in the production division. On the basis of the entire record, it is found that *Adams, Ford and Sawyer* are employees eligible to vote and they are included in the unit. *UTD Corporation*, 165 NLRB No. 48; *The Singer Company*, 170 NLRB No. 165.

Alonzo Massey and George Morris are classified as assistant foremen in the assembly and packaging area. In addition, they also are known as "floor boys." They are under the immediate supervision of Benjamin Steinberg, foreman. Besides Massey and Morris, there are six to eight women working in this department. Their primary function is to keep the women supplied with work, to inspect the products and to refer any defective materials to Steinberg. The record indicates that Steinberg is continually in the area and repeatedly checks the work of Massey and Morris as well as the work of the women in this department. In addition to the above tasks, Massey and Morris spend time on various jobs such as the buffing and cutting wood. Massey and Morris are hourly rated, punch a time clock and, except for receiving a rate higher than the other employees in their department, share the same benefits and working conditions. They have no authority to hire, fire, suspend, promote, transfer or discipline employees, nor do they responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department. The fact that they attend bi-weekly meetings classified in the record as "supervisory meetings" or "management meetings," which are

attended by the assistant to the president, the assistant plant manager, the foreman in this department, another foreman and other assistant foremen, is not sufficient grounds to find that Morris or Massey possess the statutory indicia of a supervisor. The primary function of these meetings appears to provide for the regulation of and to discuss production problems although there was evidence that the disciplining of employees was also taken up. It is found that both *Alonzo Massey* and *George Morris* are employees eligible to vote and they are included in the unit. *UTD Corporation, supra; The Singer Company, supra.*

The remaining employees in dispute are *Ivory Scott* and *Raymond Zagrafos*. Both are titled "assistant foremen" and report to Charles Kabilian, foreman. *Scott* is hourly rated, punches a time clock and works in the electro-plating department with three other men. He performs certain set-up operations of a routine nature and keeps certain production records. The Employer provided Scott with night school training in electro-plating, which training makes him more experienced in this operation than any one else in his department. Scott communicates with Kabilian as to the progress of work in the department and receives certain assignments and instructions from him. Scott testified that he did not have the authority to hire, fire, suspend, layoff, recall, promote, discipline or otherwise engage in any course of conduct that would affect the employment status of any employee in his department. In this respect, the Employer's assistant to the president testified that Scott possessed such attributes and referred to an incident wherein the Employer contends that Scott warned an employee that he would be discharged. Like Morris and Massey, Scott has participated in the so-called "supervisory" or "Management meetings." Assuming, *arguendo*, that Scott warned the employee concerning discharge, it is found that this incident is too isolated to

predicate a finding of supervisory status. Accordingly, on the basis of the record as a whole, it is found that Scott does not possess the indicia of a supervisor and he is found to be an employee eligible to vote and included in the unit. *UTD Corporation, supra; The Singer Company, supra.*

Zagrafos is under the direction of Kabilian and works in the buffing department. In addition, there are seven men and two women employed in this department. Zagrafos is hourly paid, punches a time clock and receives an hourly rate higher than the other individuals in his department but otherwise enjoys similar benefits and working conditions. Zagrafos testified that he spends eighty percent of his time "supervising" the work of the other nine individuals, ten percent performing production work and the remaining ten percent in obtaining stock. He also testified that he has recommended three individuals for wage increases and that, in fact, they did receive the increases. Additionally, Zagrafos testified that he has on one occasion fired an employee and has excused employees from working on other occasions. The record indicates that, while Zagrafos may receive general instruction from Kabilian as to work in his department, he makes specific determinations as to what employees shall perform the work and in what order. Zagrafos also attends the so-called "management and/or supervisory meetings." On the basis of the record as a whole, it is found that Zagrafos has the authority to discharge employees, to effectively recommend wage increases and to responsibly direct the employees in his department. Accordingly, it is found that *Zagrafos* is a supervisor within the meaning of the Act and he is excluded from the unit. *Research Craftmeg Corporation*, 129 NLRB 723, 725, 726.

Accordingly, the undersigned finds that the following employees constitute a unit appropriate for the purposes

of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees of the Employer at its Hyde Park, Massachusetts, plant, including the records keeping department employees, shipping and receiving employees, and the truck driver, but excluding office clerical employees, professional employees, guards and supervisors² as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility

² Based upon the record and the stipulation of the parties, the following-named individuals are found to be supervisors and, accordingly, are excluded from the unit: *Frederick Loder*, plan manager; *Kenneth Sullo*, plant manager and quality control engineer; *Cliff Thornton*, industrial engineer; *Andrew Scott*, die casting engineer; *Abe Bunhoff*, plant and maintenance engineer; *William Flynn*, assistant plant manager; *Chester Williams*, assistant plant manager; *G. Garner*, quality control manager; *Frank Jackson*, quality control manager; *Carl Larson*, production and planning manager; *Malcolm Emack*, general foreman, die casting; *Herbert Davis*, *Darnel Johnson* and *Adam Smith*, shift foremen, die casting department; *Raymond Nichols*, day foreman, trim department, *Stanley Rejunas*, afternoon foreman, trim department; *Anthony Gangemi*, foreman, toolroom; *Don Beech*, foreman, general maintenance department; *Charles Jordan*, foreman, die casting maintenance; *Charles Kabilian* and *Bernard Steinberg*, foreman, products department; *Paul LaFond*, *John Smolinski* and *Mel Fontez*, shift foremen, M-525 department; and *Eugene Lyons*, foreman, shipping and receiving department.

period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently discharged.³ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO.

Original signed by:

ALBERT J. HOBAN

Regional Director, Region One

Dated May 22, 1968
at Boston, Massachusetts

REQUEST FOR REVIEW

Comes now the Employer, Magnesium Casting Co., and pursuant to Section 102.67 of the Board's Rules and Regulations hereby requests that the Board review the Decision and Direction of Election of the Regional Director, Region

³ An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Boston, Massachusetts 02203, on or before May 29, 1968. Accordingly, please furnish two copies of the list. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

One, dated May 22, 1968 since the Decision on the factual issue of the supervisory status of employees Ivory Scott, Alonzo Massey and George Morris is clearly erroneous on the record and such error prejudicially affects the rights of the Employer.

The line of responsibility runs from Harvey Berman, products manager, to Chester Williams, assistant plant manager, to Bernard Steinberg and Charles Kabilian, both foremen and to Raymond Zagrafos, Ivory Scott, Alonzo Massey and George Morris, assistant foremen respectively in metal finishing, electro-plating, assembly and packaging (tr. pp. 34-35).

I. The Employer Submits That Assistant Foreman Ivory Scott Is a Supervisor Within the Meaning of the Act.

A. That Scott is hourly rated and punches a time clock is undisputed. This creates no distinction between Scott and Raymond Zagrafos who was found by the Regional Director to be a supervisor, and foremen Kabilian and Steinberg, who both parties stipulated are supervisors within the meaning of the Act.

B. That Scott performs set-up operations and keeps production records is also not disputed; however, the set-up operations are *not* of a "routine nature" and the production records are *not* mere recordings of production quantity or time. Scott was specially trained at the Employer's expense at Massachusetts Institute of Technology so that he could mix and check chemical solutions, take PH readings and moderate temperatures (tr. p. 226). He has full charge of this process since his foreman, Charles Kabilian, has little, if any, knowledge of plating operations (tr. pp. 103, 215). The "production records" are in fact quality control records which require Scott to judge an employee's performance and, where he finds an employee errs in his job, to correct that employee (tr. p. 225; Employer's Exhibits 1(a), (b) and (c)).

C. That Scott testified that he did not have the authority to hire, fire, suspend, lay off, recall, promote, discipline or otherwise engage in any course of conduct that would affect the employment status of any employee in his department is clearly erroneous. The entire record reveals that Scott warned employee William Washington that if he did not assist Scott and went ahead with his intention to put on his coat and leave the plant, he was fired. Washington, recognizing Scott's authority, took off his coat and assisted Scott (tr. p. 222). Scott did not discuss his action with others in management prior to making the statement (tr. p. 235). Scott was later commended for his action at one of the weekly management meetings he attends. The Regional Director contends "this incident is too isolated to predicate a finding of supervisory status." It is respectfully submitted that since Scott has been an assistant foreman for approximately seven months and there is no evidence of discharges in his department, the incident is in fact *not* isolated. According to the reasoning of the Regional Director, severe disciplinary problems must occur more frequently in order to prove one's authority.

In judging the alleged supervisory status of some employees, the Circuit Court of Appeals for the Eighth Circuit stated in *Matthews & Co. v. NLRB*, 61 LRRM 2070, at 2072.

It is well settled law that "(this section is to be interpreted in the disjunctive * * * and the possession of any one of the authorities listed in Section 2(11) places the employee invested with (such) authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F 2d 385, 387, 24 LRRM 2350 (6 Cir.) cert. denied, 338 U.S. 899, 25 LRRM 2129. Moreover 2(11) "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification," Id, at 358. Accord, *NLRB v. Edward G.*

Budd Mfg. Co., 169 F. 2d 571, 575, 576, 579, 22 LRRM 2414 (6 Cir.), cert. denied 335 U.S. 908, 23 LRRM 2228; *NLRB v. Leland-Gifford Co.*, 200 F. 2d 620, 626, 31 LRRM 2196 (1 Cir.).

Furthermore, the record discloses that the company does not suspend employees and that no layoffs have occurred since August, 1967, when Scott took his position.

D. The Regional Director neglects to discuss the other facts that lend support to the Employer's position that Scott is a supervisor.

1. Scott attends weekly meetings of the Products Division with other members of management, including Harvey Berman, Products Division Manager, Chester Williams, assistant plant manager, foremen Charles Kabilian and Bernard Steinberg, and assistant foremen Raymond Zagrafos, Alonzo Massey and George Morris (tr. p. 35). At these meetings the work for the past week is discussed, personal problems are reviewed, the assistant foremen evaluate the employees working under their direction insofar as their performance and behavior is concerned, and policy is set (tr. pp. 36, 162, 172). Scott testified that the performance of employees is discussed at the management meetings (tr. pp. 214-215, 223). At these meetings the assistant foremen have recommended hiring more help (tr. p. 39). The company policy on drinking or possessing liquor in the plant was set at one of these meetings following discussions recommendations of all those present (tr. pp. 262-263).

3. According to Scott, the responsibility for seeing that production runs correctly in the electroplating area is his own (tr. p. 222). The record reveals that Scott's authority was explained to the employees in his area when they were told that Scott was running

the room and he had charge over the employees (tr. p. 224).

4. Scott possesses the authority to discipline employees. Scott testified that at a management meeting he insisted on handling in his own way the problem of one of his employees who was smoking near the chemicals, and he did so. (tr. p. 229).

5. Scott has recommended a wage increase for employee Donald Noiles which Noiles received (tr. pp. 40, 219, 222). No independent investigation followed the recommendation (tr. p. 98).

6. Scott, together with other assistant foremen, has transferred employees (tr. pp. 75, 248-249).

That Scott denied this authority in direct examination is understandable, since his testimony was colored by his bias in favor of the petitioner, which was made the subject of an 8(b)(1)(A) charge in Case No. 1-CB-1362, which is discussed in the Regional Director's Decision.

In summary, the Regional Director has failed to thoroughly examine the record and to note that Ivory Scott does in fact possess the authority to discharge, discipline, direct and transfer employees and to recommend them for wage increases. Additionally, Scott participates fully in meetings with other members of management at which personnel performance and problems are discussed and Scott offers his own evaluations and recommendations.

II. *The Employer Submits That Assistant Foremen Alonzo Massey and George Morris Are Supervisors Within the Meaning of the Act.*

A. That the primary functions of Massey and Morris as described by the Regional Director are to keep the women working in their department supplied with work, inspect the products and refer defective materials to foreman Steinberg is clearly erroneous. According to Morris' own testimony, he has control over the assembly and packaging of

the gift line (tr. p. 171), assigns work, and requests work for his people if they are not in his opinion sufficiently occupied (tr. pp. 171, 179, 181). In addition, he orders stock and oversees the quality coming from his department (tr. pp. 182-183, 185). Like Scott, he fills out a quality control check list and corrects employees' mistakes, (tr. pp. 182-183).

Alonzo Massey testified that he keeps the women supplied with materials and makes sure they are doing their jobs correctly (tr. pp. 138-139). He checks the quality of each employee's work and warns them if they are performing their jobs improperly (tr. , 147, 159).

B. That Massey and Morris have no authority to fire, transfer or discipline employees, or responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department is incorrect. The record is clear that Massey and Morris possess the authority to discharge employees (tr. pp. 37, 177, 216, 240, 262-263). Both have the authority to transfer employees and assign work (tr. pp. 145, 179). Massey testified that his foreman, Steinberg, must request Massey's permission to use an employee in Massey's area (tr. p. 145). Massey related a conversation with assistant plant manager Williams in which Massey was told to handle all personnel problems in his area himself since they were his own responsibility (tr. p. 157). Massey, in fact, resented any interference with that authority (tr. pp. 157-158).

Morris testified that he has the authority to discipline and the responsibility to control his employees. He referred to specific incidents when he had spoken individually to employees and told them to stop smoking and reduce their talking (tr. p. 184).

III. *Issues*

Are assistant foremen Scott, Massey, and Morris supervisors within the meaning of the Act?

IV. Employers Position'

The assistant foremen have the authority to discharge, transfer, assign effectively, recommend for raises, discipline and responsibly direct other employees and they report and recommend personnel actions and policies; therefore they are supervisors and must be excluded from the unit.

V. Argument

The assistant foremen are all vested with the authority of supervisors within the meaning of the Act and have in fact exercised that authority.

It is undisputed that the assistant foremen attend weekly supervisory meetings where personnel problems, including discipline, morale, and work rules are discussed, as well as personnel needs, and decisions are made as to personnel policy and production. The judgment and advice of the assistant foremen are constantly relied upon by other members of management. Contrary to the Regional Director's determination, it has been repeatedly held that attendance at periodic meetings of supervisory personnel is strong indicia of supervisory authority, *Borden Co.*, 157 NLRB No. 93, 61 LRRM 1467, 1469; *Watkins Furniture Co.*, 160 NLRB No. 20, 62 LRRM 1599; *Heck's Inc.*, 156 NLRB No. 73, 61 LRRM 1128.

Furthermore, the evidence discloses that the assistant foremen are responsible for their operations—overseeing production and directing the work force. Among their duties are seeing that work scheduled to be done is distributed and produced, moving employees from job to job, transferring employees and checking their quality—all of which require the use of independent judgment and are not merely routine or clerical in nature. Such functions clearly indicate supervisory authority. *Johnson Metal Products Co.*, 161 NLRB No. 76, 63 LRRM 1362; *Regency Electronics, Inc.*, 169 NLRB No. 49, 67 LRRM 1308; *Borden Co.*, *Supra*.

In *Irving Air Chute Co., Inc.*, 149 NLRB 62, 635, the trial Examiner stated, and his findings were adopted by the Board:

"Through both Lee and Gofgosky perform production work, their duties include not only production but also the overseeing, on a regular basis, of the work of the employees in their departments. In this capacity they are required to check the work and instruct the employees on how to perform it and they are responsible for seeing that the orders of Mathewson are carried out. Moreover, the employees themselves, as in the case of Kinner, were told by Mathewson that they had to obey the instructions of the leadmen.

Accordingly, I conclude and find that both Wayne Lee and John Gofgosky are supervisors within the meaning of the Act."

Moreover, the Regional Director neglects the evidence which explicitly indicates that the Employer held out the assistant foremen to be supervisors and to have control over their respective operations, and the employees understood this, i.e. Noiles and Washington, by their conduct and that of the Employer, clearly indicated such recognition of their assistant foreman's authority, see *Harvey Aluminum (Inc.)* 156 NLRB No. 115, 61 LRRM 1260.

That the assistant foremen recommend pay increases and such recommendations were followed without independent investigation by the Employer is undisputed. In *Home Exterminating Co.*, 160 NLRB No. 108, 63 LRRM 1163, the Board, finding an employee to be a supervisor, stated:

"He has no authority to hire, discharge, or discipline employees, but the record indicates that his personnel recommendations would probably be effective without an independent investigation."

Certainly the evidence in the immediate case discloses the

assistant foremen have considerably more authority than that outlined in the *Home Exterminating* case since Scott, like Supervisor Zagrofes, effectively recommended a wage increase. In addition, the evidence establishes that they also have the responsibility of directing the work in their particular operation where they act on their own appraisal of the skills and experience of the employees, assigning work accordingly and recording quality judgment on a detailed quality control sheet. Such functions are clearly reserved to management personnel and are supervisory. *Powers Regulation Co. v. NLRB*, (CA 7) 61 LRRM 2124, enfq. 149 NLRB No. 119, 57 LRRM 1436.

In addition to the above authority, the assistant foremen have the authority to discharge employees without consulting with other members of management, i.e., Scott's threat to discharge Washington for insubordination. Furthermore, assistant foremen have the authority to control the behavior of employees in their area and to discipline them if necessary. Such authority is clearly indicative of an employee in a supervisory capacity. *Posner, Inc.*, 145 NLRB 1190; *Universal Packaging Corp.*, 149 NLRB No. 31.

The similarity of the authority of the assistant foremen in the immediate case to that of the "leadmen" in *Matthews & Co. v. NLRB*, supra at 2072, 2073 is notable:

"On the basis of our analysis of the record, we are of the opinion that the Board's determination that such leadmen are in fact supervisors has both the necessary warrant in the record and a reasonable basis in law. Of controlling importance is the testimony that the leadmen assign work to the employees in their departments; transfer employees from job to job, as necessary in their sole opinion; pass on employee requests for time off; effectively recommend discipline; and oversee the other employees' work, as well as checking its quality. *NLRB v. Syracuse Stamping*

Co., 208 F. 2d 77, 79, 33 LRRM 2127 (2 Cir.); *Eastern Greyhound Lines v. NLRB*, 337 F. 2d 84, 57 LRRM 2241 (6 Cir.); *NLRB v. Southern Bleachery & Print Works*, 257 F. 2d 235, 239, 42 LRRM 2533 (4 Cir.), cert. denied, 359 U.S. 911, 43 LRRM 2576. In addition, the record discloses that the leadmen meet regularly with Factory Foreman Landis, occasionally with Plant Superintendent Morton, and on one occasion all four leadmen attended a training session in Pittsburgh, the Company Headquarters. Of further significance in this connection is the testimony that the leadmen are paid from eleven to forty cents an hour more than the regular employees in their departments, and that petitioner's officials represented that the leadmen were their supervisors and the regular employees so regarded them. *NLRB v. Schill Steel Products, Inc.*, 340 G. 2d 568, 571-572, 58 LRRM 2177 (5 Cir.). Finally to be noted is the fact that if the leadmen were not supervisors, Factory Foreman Landis would have to exercise detailed supervision over some thirty-seven employees in the departments involved in a variety of tasks and handling products at many stages of completion in the production process. The unlikelihood of that situation occurring was properly considered by the Board. *Vega, et al. v. NLRB*, 341 F. 2d 576, 577, 58 LRRM 2439 (1 Cir.); *NLRB v. Supreme Dyeing & Finishing Corp.*, 340 F. 2d 493, 494, 58 LRRM 2281 (1 Cir.); *NLRB v. Mt. Clemens Metal Products Co.*, 287 F. 2d 790, 491, 47 LRRM 2771 (6 Cir.), enforced as modified, 126 NLRB 1297, 1298, n. 4, 45 LRRM 1465.

In short, the record here clearly supports a finding that the four leadmen are clothed "with genuine power to perform a supervisory function" (*NLRB v. Leland-Gifford, supra*) and the Board properly classified them as supervisors within the meaning of Section 2(11)

of the Act. Thus we hold that the Board correctly excluded leadmen from the bargaining unit and that petitioner is responsible for their conduct in connection with the found Section 8(a)(1) violations to be

VI. CONCLUSION

On the basis of the entire record, it is respectfully submitted that the Regional Director erred in his decision and that the credible evidence overwhelmingly proves that assistant foremen Ivory Scott, Alonzo Massey, and George Morris are supervisors within the meaning of Section 2 (11) of the Act and should be excluded from the appropriate unit.

Respectfully submitted,
STONEMAN AND CHANDLER
Original signed by:
Jerome H. Somers

[Certificate of Service Omitted]

TELETYPE

JUNE 18, 1968
TIME: 3:00 P.M.

ALBERT J. HOBAN, REGIONAL DIRECTOR
NLRB, BOSTON, MASS.

RE: MAGNESIUM CASTING CO., 1-RC-9973. IT IS
HEREBY ORDERED THAT THE EMPLOYER'S RE-
QUEST FOR REVIEW OF THE REGIONAL DIREC-
TOR'S DECISION AND DIRECTION OF ELECTION
BE, AND IT HEREBY IS, DENIED AS IT RAISES NO
SUBSTANTIAL ISSUES WARRANTING REVIEW.
BY DIRECTION OF THE BOARD:

(s) HOWARD W. KLEEB, Deputy
Ex. Secy.
NLRB, Washington, D.C.

emh/lm

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 7184.

MAGNESIUM CASTING CO.,

PLAINTIFF, APPELLEE,

v.

**ALBERT J. HOBAN, REGIONAL DIRECTOR
OF THE FIRST REGION OF THE NATIONAL LABOR
RELATIONS BOARD, ET AL.,
DEFENDANTS, APPELLANTS.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.**

Arnold Ordman, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, and *Gary Green* and *Abigail Cooley Baskir*, Attorneys, on memorandum of appellants in support of their motion for summary reversal.

Louis Chandler, *Jerome H. Somers* and *Stoneman and Chandler* on memorandum of appellee in opposition thereto.

September 10, 1968

ALDRICH, Chief Judge. This is a motion by the National Labor Relations Board and others, defendants appellants, for summary reversal for "manifest error." First Circuit Rule 5, July 1, 1968. The facts which afford the basis of our decision¹ may be fairly stated.

In March 1968, a union² filed a petition for election among certain employees of Magnesium Casting Co., plaintiff appellee herein. The customary formal hearing was

¹ We do not pass upon all of the issues raised by the Board, and we do not consider certain additional facts sought to be alleged by the involved union, would-be intervenor. The petition to intervene is mooted.

² United Steelworkers of America, AFL-CIO.

conducted in April, and on May 22 the Regional Director ordered that an election be held on June 21. The plaintiff was directed to furnish a list of names and addresses of all eligible employees within seven days, pursuant to the so-called *Excelsior* rule. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236. Plaintiff furnished such a list on May 29.

On June 12, 1968, this court decided in *Wyman Gordon Co. v. NLRB*, F. 2d, that the *Excelsior* rule had been promulgated in violation of the Administrative Procedure Act, and held that noncompliance therewith could not form the basis of a subpoena or order against the employer. Relying on this decision the present plaintiff, on June 17 and thereafter, requested the Board to set aside its May 22 decision and order. The Board refused. The election was conducted as scheduled, and the union won. In the district court the plaintiff then sought a mandatory injunction setting aside the election as void. The defendants moved to dismiss, *inter alia* attacking the jurisdiction of the court, asserting that the case was not one of voidability within *Leedom v. Kyne*, 1958, 358 U.S. 184. The court did not pass on this motion, but entered an interlocutory injunction against the defendants, enjoining them from certifying the results of the election pending the outcome of certiorari proceedings in *Wyman Gordon*. Defendants appealed, and now bring the present motion.

OPINION OF THE COURT

We reverse. The court has substantially misconstrued the effect of *Wyman Gordon*. Plaintiff's recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the union were so minded. Plaintiff could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings.³ This is a clear case of waiver.

³ We do not pause to consider how, if plaintiff's position were to be upheld, the egg could be unscrambled.

There is no merit in the contention that the election was unlawful. The fact that the Board improperly ordered the plaintiff to supply certain factual information was not jurisdictional so far as the election itself was concerned, but merely collateral thereto. A matter far more jurisdictional was held to be waived in *United States v. L. A. Tucker Truck Lines, Inc.*, 1952, 344 U.S. 33, because not promptly asserted. It is true that plaintiff did not wait long in the case at bar as did Tucker, but the principle is the same. Plaintiff should have separated and resisted the illegal portion of the May 22 order rather than have complied therewith and then claimed that compliance tainted the rest.

Equally there is no merit in the claim made in plaintiff's brief in this court that the Board misrepresented its powers. There was no misrepresentation of fact in *Excelsior*. The facts were correctly set forth in the opinion. All that was involved was a question of law. That is no more a basis of misrepresentation than is the Board's claimed "threat" to take legal recourse actionable coercion. See *Commercial Credit Corp. v. Sorgel*, 5 Cir., 1960, 274 F. 2d 449, 453, cert. denied 390 U.S. 985.

Labor matters should proceed promptly. Plaintiff was no different from the employer in *Wyman Gordon*. Not being as alert to its rights, it missed the boat, or more exactly, boarded a boat it need not have. That is the end of it.

Plaintiff's motion for oral argument is denied. We have reviewed its brief, and consider the issue so plain that we would not be helped by oral argument. Due process does not require oral argument in every case, as is made apparent by the Supreme Court's summary reversal procedure on petition for certiorari.

The interlocutory order of the district court is vacated and that court is instructed to dismiss the complaint.

**SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Decision and Direction of Election by the Regional Director, dated May 22, 1968, an election was conducted on June 21, 1968 among the employees in the unit found appropriate. The Tally of Ballots cast at said election is as follows:

Approximate number of eligible voters	205
Void ballots	0
Votes cast for Petitioner	140
Votes cast against participating labor organization	59
Valid votes counted	199
Challenged ballots	1
Valid votes counted plus challenged ballots	200

On June 28, 1968 the Employer filed timely Objections to Conduct Affecting the Results of the Election and served a copy thereof upon the Petitioner.

The Objections allege the following:

- “1. Following a formal hearing on the petition for representation filed by the United Steelworkers of America, AFL-CIO, hereinafter called ‘the Union’, Albert J. Hoban, Regional Director for the First Region issued a Decision and Direction of Election, dated May 22, 1968, in which the Employer was required to file within seven days with the Regional Director an election eligibility list containing the names and addresses of all eligible voters. The list was to be made available to all parties to the election. The Decision stated that ‘failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed,’ and cited *Excelsior Underwear, Inc.*, 156 NLRB 1236 as the authority which established this ‘rule’.

Complying with the requirements of the *Excelsior* rule under the threat of the election being set aside absent such compliance, the Employer provided the list to the Board on May 29, 1968.

On June 12, 1968, the United States Court of Appeals for the *First Circuit*, in *Wyman-Gordon Company et al v. National Labor Relations Board*, No. 7000, 68 LRRM 2483, ruled that the procedure followed in implementing the *Excelsior* rule did not properly conform to the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. Sections 552, 553. By promulgating the *Excelsior* 'rule' in the manner it did, the Board violated Congress instruction as to the procedures it must follow as a Government agency.

According to the *Wyman-Gordon* decision, the Board's *Excelsior* rule had the purpose of 'requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns'. *ibid.* at 2485. This 'affirmative assistance' to the Petitioner at the direction of the Board under a rule promulgated in contravention of the Administrative Procedure Act in furnishing the list of names and addresses to the Petitioner is, by its very nature, conduct which prejudicially affects the results of the election.

On June 17, 1968, the Employer filed with the Regional Director a Motion to Withdraw the Decision and Direction of Election and Dismiss Petition. On June 19, 1968, the Regional Director denied the Motion on the basis that the *Wyman-Gordon* decision, as he interpreted it, does not

have 'retroactive application.' Immediately thereafter, the Employer filed a request for special permission to appeal the Regional Director's action. The Board denied the request 'as lacking in merit.'

Since the decision in *Wyman-Gordon* struck down the *Excelsior* 'rule' because its promulgation contravened the Administrative Procedure Act, the rule must be invalid *ab initio*; therefore, the Court's decision must be retroactively effective.

Furthermore, it should be noted that failure to comply with the *Excelsior* requirements is explicitly held to be conduct to which a union may properly object and have the election set aside. The Employer respectfully urges that the converse of this situation — namely, compliance with an invalid rule necessitates that the election be set aside when proper objections are filed.

- "2. Prior to the election the Union, by its officers and agents, informed employees of the Employer that if they did not sign an authorization card for the Union and vote for the Union, they would have to pay \$75 initiation fees to the Union."

On July 30, 1968, the Employer, by its attorney, notified the undersigned that it had chosen to rely solely on the issue presented by Objection No. 1 and that it did not wish to proceed on Objection No. 2.¹

Pursuant to Section 102.69 of the Board's Rules and

¹ The Employer took the same position in its Motion to Dismiss Steelworkers Motion to Dissolve Preliminary Injunction filed with the United States District Court for the District of Massachusetts on July 31, 1968.

Regulations, Series 8, as amended, the undersigned has conducted an investigation of the Objections. The investigation reveals the following:

OBJECTION NO. 1:

On June 12, 1968, following the issuance of the Decision and Direction of Election herein, the United States Court of Appeals for the First Circuit handed down its opinion in *Wyman-Gordon Company et al. v. N.L.R.B.*,² setting aside an order of the District Court enforcing compliance with a Board subpoena ordering *Wyman-Gordon Company* to furnish names and addresses of its employees in accordance with the rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236. On June 17, 1968 the Employer in this case filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition, relying on *Wyman-Gordon* and setting forth substantially the same argument embodied in its Objection.

On June 19, 1968 I denied the Employer's motion on the ground that the decision of the First Circuit in *Wyman-Gordon* did not provide for retroactive application. On the same date, the Employer requested the Board for special permission to appeal my denial of its motion. On June 21, 1968, but before the election was held, the Board denied the Employer's Request for Special Permission to Appeal.

Following the election and the filing of its Objections, the Employer, on July 11, 1968, filed a Complaint in the United States District Court for the District of Massachusetts seeking to enjoin the Regional Director and the Board from certifying the Petitioner, and after hearing thereon, the District Court issued an Order³ enjoining the defendants from certifying the results of the election pending the out-

² No. 7000, ___ F. 2d ___ (1st Cir. 1968), 68 LRRM 2483.

³ *Magnesium Casting Co. v. Albert J. Hoban, Regional Director, National Labor Relations Board, et al.* No. 68-625-C, ___ F. Supp. __ (D.C. Mass. 1968), 68 LRRM 2765.

come of an application to the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the First Circuit in *Wyman-Gordon*.⁴

On August 2, 1968, the Defendants appealed to the United States Court of Appeals for the First Circuit from the Order of the District Court enjoining the certification and on September 10, 1968 the Court of Appeals entered its Judgment⁵ reversing the action of the District Court.⁶ The Court of Appeals expressed itself as follows:

". . . The Court [below] has substantially misconstrued the effect of *Wyman-Gordon*. Plaintiff's recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the Union were so minded. Plaintiff could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings. This is a clear case of waiver."

In light of the opinion of the United States Court of Appeals for the First Circuit, it is concluded that this Objection is without merit. Accordingly, since Objection No. 2 has been withdrawn, no merit attaches to any part of the Objections and they are overruled in their entirety.

CERTIFICATION OF REPRESENTATIVE

Pursuant to the authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that UNITED STEEL-WORKERS OF AMERICA, AFL-CIO has been designated and selected by a majority of the employees of the

⁴ The Board's application for a writ of certiorari was granted and the *Wyman-Gordon* case is on the docket of the Supreme Court for the 1968-69 term. (Docket No. 463).

⁵ *Magnesium Casting Co. v. Albert J. Hoban, Regional Director, National Labor Relations Board, et al.* No. 7184, ___ F. 2d ___ (1st Cir. 1968), 69 LRRM 2235.

⁶ On October 2, 1968 the District Court, in accordance with the Judgment of the Court of Appeals, entered its own Judgment vacating its Interlocutory Order and dismissing the Complaint.

above-named Employer, in the unit described below, as their representative for the purpose of collective bargaining, and that, pursuant to Section 9(a) of the Act, the said organization is the exclusive representative of all the employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

THE UNIT: "All production and maintenance employees of the Employer at its Hyde Park, Massachusetts plant, including the records keeping department employees, shipping and receiving employees, and the truck driver, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

Signed at Boston, Massachusetts, this 11th day of October, 1968.

On behalf of the
**NATIONAL LABOR RELATIONS
 BOARD**

Original signed by:

ALBERT J. HOBAN

Director, Region 1

National Labor Relations Board
 Boston, Massachusetts 02203

TELETYPE

OCT. 18, 1968

TIME: 4:50 P.M.

OGDEN FIELDS

NLRB, WASH., D.C.

REGARDING MAGNESIUM CASTING COMPANY
 CASE NO 1-PC-9973 EMPLOYER EXCEPTS TO SUP-
 PLEMENTAL DECISION AND CERTIFICATION OF
 REPRESENTATIVE ISSUED BY REGIONAL DIREC-

TOR ON OCTOBER 11 1968 FOR REASON THAT EMPLOYER WILL SEEK WRIT OF CERTIORARI BEFORE THE UNITED STATES SUPREME COURT. REGIONAL DIRECTORS DECISION IS BASED ON OPINION OF FIRST CIRCUIT COURT OF APPEALS 69 LRRM 2235 WHICH IS NOT COURT OF LAST RESORT. THEREFORE EMPLOYER REQUEST THAT CERTIFICATION BE HELD IN ABEYANCE PENDING DISPOSITION BY SUPREME COURT OF WRIT OF CERTIORARI. COPY SENT TO OTHER PARTIES. COPIES FOR BOARD WILL FOLLOW.

Magnesium Casting Co.
By its Attorneys
STONEMAN AND CHANDLER
JEROME H. SOMERS

NATIONAL LABOR RELATIONS BOARD
NLRB, 1st Region
Att: Albert Hoban
Boston, Mass.

Stoneman & Chandler
Att: Jerome H. Somers, Esq.
79 Milk Street
Boston, Mass.

Angoff, Goldman, Manning & Pyle
Att: E. David Wanger, Esq.
44 School Street
Boston, Mass.

RE: MAGNESIUM CASTING CO., 1-RC-9973. IT IS
HEREBY ORDERED THAT THE EMPLOYER'S RE-
QUEST FOR REVIEW OF THE REGIONAL DIREC-

TOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OR REPRESENTATIVE BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD.

Robert Volger

Associate Executive Secretary

Order Section	dab	5959	11/1/68	11:25 AM
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COMPLAINT AND NOTICE OF HEARING

It having been charged by United Steelworkers of America, AFL-CIO, 1486 Dorchester Avenue, Boston, Massachusetts (herein called the Union) that Magnesium Casting Co., 98 Business Street, Hyde Park, Massachusetts (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act) the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1. The Charge in this proceeding was filed by the Union on October 23, 1968 and a copy thereof served upon Respondent on October 23, 1968.
2. Respondent is and has been at all times material hereto a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.
3. At all times herein mentioned, Respondent has maintained its principal office and place of business at 98 Business Street in the City of Boston, County of Suffolk, and Commonwealth of Massachusetts, (herein called the Hyde

Park plant), and is now and continuously has been engaged at said plant in the manufacture of die casting and related products.

4. Respondent in the course and conduct of its business causes, and continuously has caused at all times herein mentioned, large quantities of magnesium used by it in the manufacture of desk accessories to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts, and causes, and continuously has caused at all times herein mentioned, substantial quantities of desk accessories to be sold and transported from said plant in interstate commerce to States of the United States other than the Commonwealth of Massachusetts.

The Respondent annually ships to and receives from States outside the Commonwealth of Massachusetts materials valued in excess of \$50,000.

5. The aforesaid Magnesium Casting Co. is and has been engaged in commerce within the meaning of the Act.

6. The Union is a labor organization within the meaning of Section 2(5) of the Act.

7. All production and maintenance employees of Respondent employed at its Hyde Park, Massachusetts plant, including the records keeping department employees, shipping and receiving employees, and the truck driver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. On or about June 21, 1968, a majority of the employees in the unit described in Paragraph 7, by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board, designated or selected the Union as their representative for the purpose of collective bargaining.

9. At all times material herein, the Union has been the representative for the purposes of collective bargaining of a majority of the employees in the said unit and, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in the said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

10. On or about October 22, 1968, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above in Paragraph 7.

11. On or about October 22, 1968, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in Paragraph 7.

12. By the acts described above in Paragraph 11, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

13. By the acts described above in Paragraph 11, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

14. The activities of Respondent, described above in Paragraph 11, occurring in connection with the operations of Respondent, described above in Paragraphs 3 and 4 have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 25th day of November, 1968 at 10:00 o'clock in the forenoon, Eastern Standard Time, at Room 2007, John F. Kennedy Federal Building, Boston, Massachusetts, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the First Region, on this 8th day of November, 1968, issues this Complaint and Notice of Hearing against Magnesium Casting Co., Respondent herein.

Original signed by:

ALBERT J. HOBAN,
Regional Director
National Labor Relations Board
First Region
Boston, Massachusetts 02203

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS
HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN
UNFAIR LABOR PRACTICE CASES AS TAKEN FROM THE BOARD'S
PUBLISHED RULES AND REGULATIONS AND
STATEMENTS OF PROCEDURE

The hearing will be conducted by a Trial Examiner of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D.C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Trial Examiner, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record — for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Trial Examiner conducting the pre-hearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Trial Examiner for his approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Trial Examiner may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the Trial Examiner who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Trial Examiner will be considered unless received by the Chief Trial Examiner in Washington, D.C. (or, in cases under the San Francisco, California branch office of Trial Examiners, the Associate Chief Trial Examiner in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Trial Examiner or Associate Chief Trial Examiner, as the case may be. All briefs or proposed findings filed with the Trial Examiner must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Trial Examiner will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Trial Examiner's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Trial Examiner's Decision, the submission of supporting briefs, requests for oral argument before the

Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 192.46, and following sections. A summary of the more pertinent of these provisions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Trial Examiner will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-CA-6498

[Title Omitted]

ANSWER TO COMPLAINT

1. Respondent admits to the allegations in paragraphs one through six of the Complaint.
2. Respondent denies each and every allegation of paragraphs seven through fifteen of the Complaint as completely and specifically as if each were herein separately set forth and separately denied.
3. Respondent alleges that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act should exclude assistant foremen in the Respondent's Products Division since such assistant foremen are supervisors within the meaning of Section 2(11) of the Act, and therefore the Union's representation petition should have been dismissed.
4. Respondent alleges that the showing of interest obtained by the Union was sufficiently tainted by the solicitation of authorization cards by supervisors so as to warrant

dismissal of the Union's representation petition in Case No. 1-RC-9973 and therefore revocation of the Regional Director's Certification of Representative.

5. Respondent alleges that the election of June 21, 1968 was not conducted according to rules promulgated in accordance with Section 6 of the Act, and therefore the results of the election cannot be the basis for a Certification of Representative and an obligation that Respondent engage in collective bargaining with the Union.

6. Respondent alleges that the election of June 21, 1968 was not conducted according to rules promulgated in accordance with the Administrative Procedure Act, 5 U.S.C.A. Secs. 552 and 553 and therefore the results of the election cannot be the basis for a Certification of Representative and an obligation that Respondent engage in collective bargaining with the Union.

7. Respondent alleges that this Complaint is brought without regard to Respondent's right to seek a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in *Magnesium Casting Co. v. Albert J. Hoban, et al.*, No. 7184, upon which the Regional Director based his Supplemental Decision and Certification of Representative, issued October 11, 1968, which the Board affirmed by denying Respondent's request for review, said denial being issued November 1, 1968, and that this Complaint should be held in abeyance pending disposition by the Supreme Court of the United States of Respondent's petition for writ of certiorari.

Respectfully submitted,
MAGNESIUM CASTING CO.

* * *

(s) Louis Chandler

(s) Jerome H. Somers

Dated at Boston, Massachusetts on November 19, 1968

[NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS]

[Title Omitted]

**ORDER TO SHOW CAUSE ON MOTION FOR
SUMMARY JUDGMENT**

Counsel for the General Counsel having on December 5, 1968, filed a Motion for Summary Judgment dated December 3, 1968, all parties are directed to show cause before me in writing, if cause they have, on or before December 20, 1968, as to whether or not the Motion should be granted. Responses to the Order shall be accompanied by any briefs, proposed findings or other matter intended to be submitted for consideration, either in connection with disposition of the Motion or in connection with disposition of the case on the merits. If no response disclosing material unresolved issues litigable before and requiring hearing by a trial examiner is filed by December 20, 1968, the Motion for Summary Judgment may be granted forthwith.

Responses shall be directed to Charles W. Schneider, Trial Examiner, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

Ruling on the Respondent's Motion for Bill of Particulars filed November 19, 1968, is reserved pending disposition of the Motion for Summary Judgment.

Original signed by:
CHARLES W. SCHNEIDER
Trial Examiner

Dated: December 6, 1968, Washington, D.C.

[Title Omitted]

RESPONDENT'S REPLY TO SHOW CAUSE ORDER

I. Omission of Facts By General Counsel.

Comes now Magnesium Casting Co., Respondent herein,

and in reply to the Trial Examiner's Order to Show Cause first states that General Counsel has not fully disclosed the entire background of the case herein, since he has omitted two crucial documents having significant bearing on this case. First, General Counsel does not state the fact that the Employer's Motion to Withdraw Decision and Direction of Election and Dismiss Petition was denied by the Regional Director on the grounds that *Wyman-Gordon Company et al v. National Labor Relations Board*, 397 F.2d 394 (1968) did not have "retroactive application" (copy attached as Appendix A). Second, General Counsel neglects to assert that on request for review, the Board denied the request as "lacking in merit" (copy attached as Appendix B); at no time did the Regional Director or the Board rely on or assert a doctrine that the Respondent had waived its right to object to the *Excelsior* requirement by submitting the list.

Respondent Moves that the Motion for Summary Judgment be Denied for the Following Reasons:

II. The Complaint Issued by General Counsel is Premature.

The Regional Director's Supplemental Decision and Certification of Representative (Exhibit G attached to Motion for Summary Judgment), affirmed by the Board on November 1, 1968, is *not* based on a final decision of the federal courts since Respondent, on December 9, filed with the United States Supreme Court to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit Court (attached as Appendix C), seeking to have the Supreme Court reverse the decision of the First Circuit in *Magnesium Casting Co. v. Albert J. Hoban, et al.*, No. 7184, F.2d, which had reversed the decision of the United States District Court for the District of Massachusetts in *Magnesium Casting Co. v. Albert J. Hoban, et al.*, Civil Action No. 68-625-C, F. Supp. Should the Board issue

a bargaining order prior to a decision of the Supreme Court it would require the Company to bargain while awaiting a decision of the Supreme Court which may well declare the election upon which the bargaining order is based to be invalid and, therefore, nullify any requirement to bargain. Practically speaking, such a posture may cause the Respondent irreparable harm and hopelessly disrupt employer-employee relations.

Furthermore, the duplication of effort which will result from this hearing is precisely what the Board seeks to avoid. Why does the General Counsel proceed to issue a complaint in which one of the defenses raised is one which the parties are presently litigating in the courts? Of what effect is a Board resolution of this dispute over conduct affecting the results of the election when in fact the Supreme Court has now agreed to review the validity of the *Excelsior* rule in the case of *Wyman-Gordon Company, et al v. National Labor Relations Board*, supra, and is considering Respondent's petition for certiorari, which has been docketed by the Court? Should the Trial Examiner and Board find for the General Counsel and enforcement efforts be made in the courts, are we not placed in a posture similar to that presently existing? The General Counsel, by attempting to go forward in this manner, is engaging in duplication of effort and harassment of the Respondent.

III. *General Counsel Should be Estopped From Seeking a Motion for Summary Judgment which Conflicts with Assurances by General Counsel, Conveyed by United States Senator Edward M. Kennedy, that Respondent is Entitled to a Full and Complete Hearing.*

General Counsel's Motion for Summary Judgment is in direct conflict with information provided to Respondent by Arnold Ordman, General Counsel of the Board, and by Edward M. Kennedy, United States Senator from the

Commonwealth of Massachusetts. On October 11, 1968, Kenneth Sullo, president of Respondent, wrote to Senator Edward M. Kennedy and inquired whether Respondent "will have an opportunity to present its evidence at a formal hearing" should the Board issue a complaint (letter attached as Appendix D).

On October 23, 1968, Senator Kennedy acknowledged Mr. Sullo's letter and stated he was referring it to the "appropriate authorities" (letter attached as Appendix E).

On October 30, 1968, Senator Kennedy wrote to Mr. Sullo enclosing a copy of a letter from Arnold Ordman, General Counsel, stating that a respondent "is entitled to participate fully and present whatever evidence it has in support of its position to a duly designated Trial Examiner" in a hearing and that such proceeding will be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure (attached as Appendixes F-1 and F-2).

General Counsel's Motion for Summary Judgment does not conform with his own statements in his letter to Senator Kennedy which the senator forwarded to Mr. Sullo. The granting of the Motion for Summary Judgment would clearly result in the deprivation of the right to participate fully in a hearing and present whatever evidence Respondent has in support of its position on all of the issues to a Trial Examiner, in accordance with the rules of evidence. Respondent urges that the misleading remarks of General Counsel in response to its president's inquiry made through the office of Senator Kennedy have prejudiced its posture in this case and General Counsel should be estopped from even seeking to obtain a Summary Judgment.

IV. The Decision of the First Circuit Court of Appeals in Wyman-Gordon and the Imminent Decision of the United States Supreme Court in the Same Case Constitute Such Newly-Discovered Evidence as to Necessitate a Full and Complete Hearing.

The decision of the United States Court of Appeals for the First Circuit in *Wyman-Gordon Company, et al v. National Labor Relations Board*, supra, declared the *Excelsior* rule to have been illegally promulgated and was issued following Respondent's submission of the *Excelsior* list to the Regional Director. It is respectfully submitted that this new decision, following Respondent's compliance with the requirements of *Excelsior*, together with the imminent decision of the Supreme Court of the United States on the writ of certiorari from the First Circuit Court's *Wyman-Gordon* decision, which was subsequently granted, constitute such newly-discovered evidence which, having a substantial effect upon the representation election and upon these proceedings, necessitates a full and complete hearing before a trial examiner and precludes a summary judgment. Furthermore, the necessity for holding this proceeding in abeyance pending the decision of the United States Supreme Court in *Wyman-Gordon*, and pending action on the Respondent's petition for writ of certiorari is readily discernible, since the resolution of the issue of waiver raised in Respondent's petition for certiorari may well resolve at least one issue, i.e., that concerning whether the *Wyman-Gordon* case constitutes newly-discovered evidence.

V. *The Representation Election of June 21, 1968 was Not Conducted According to Rules Promulgated in Accordance with Section 6 of the Act and Therefore is Invalid.*

Respondent submits that since the election of June 21, 1968, was not conducted pursuant to rules promulgated in accordance with Section 6 of the Act, the election must be voided and no certification can be based upon its results.

That the submission of the list of names and addresses assisted the union and gave them access to information not readily available cannot be disputed. And even if it is

disputed, it creates a factual issue upon which a hearing must be held in order to ascertain those facts necessary to make an informed decision. Any other effects resulting from Respondent's compliance with the illegally promulgated rule must also be aired in a hearing.

Furthermore, a respondent should have the opportunity to present evidence pertaining to its position that the denial of its right to notice and publication of a proposed ruling under the Administrative Procedure Act as required by Section 6 of the Act denied its rights to due process. The opportunity to present its position, as well as to have others present their positions, was denied Respondent when the Board followed its own improvised rule-making procedure in complete disregard of the explicit intent of Congress in Section 6 of the Act. Perhaps, if the proper procedure had been followed, a rule prohibiting unions to visit employees' homes would have been promulgated in order to balance the *Excelsior* requirement — or perhaps other ideas would have been presented so as to alter, amend, modify or supplement the *Excelsior* rule.

The General Counsel, by insisting on proceeding with this Complaint, again appears to show disregard of the intent of Congress. Should the Supreme Court in *Wyman-Gordon* find that the *Excelsior* rule was improperly promulgated there can be little doubt that Respondent in this action was prejudiced by being subjected to an election conducted under conditions imposed in a manner contrary to Congressional intent, and by being required to recognize and bargain with a Union which certification was based on that election. Certainly the "laboratory conditions" which are so overzealously sought to be preserved by the Board in conducting its elections have been violated and, therefore, the results of that election should not be the basis for any certification.

VI. The Appropriate Unit Should Have Excluded as Supervisors the Assistant Foremen in the Products Division.

Respondent submits that the unit appropriate for the purposes of collective bargaining should have excluded assistant foremen in the Products Division since they are supervisors within the meaning of Section 2(11) of the Act.

Respondent offers to prove through the presentation of evidence that :

(1) the Products Division has four separate operations, including metal finishing, electroplating, assembly and packaging, each of which is directed by an assistant foreman who is responsible to one of two foremen of the Division, who undisputedly are supervisors within the meaning of the Act;

(2) the assistant foremen attend and participate in management meetings to discuss and evaluate the performance of individual employees, analyze workloads, establish policy, discuss production problems, quality control and the hiring of additional employees;

(3) the assistant foremen possess and do exercise the independent authority to discharge, suspend or discipline employees;

(4) they have and do exercise the responsibility to direct employees in order to ensure the smooth flow of production, including among other duties, transferring employees, granting leaves of absence, determining products to be manufactured, assessing quality of production, and maintaining discipline;

(5) they receive considerably higher wage rates than non-supervisory employees;

(6) the assistant foremen have and do exercise the authority to recommend employees for wage increases.

Respondent submits that the testimony to be elicited at the hearing, together with that additional evidence pur-

posely withheld by witnesses presented by the Union in the prior representation hearing will support Respondent's position that the assistant foremen in the Products Division should be excluded from the appropriate unit, since they are supervisors within the meaning of the Act.

The possession of the above indicia of supervisory capacity is clearly sufficient to establish supervisory authority. Possession of any one of the authorities listed in Section 2(11) places the employee invested with that authority within the definition of supervisor. *Ohio Power Co. v. National Labor Relations Board*, 176 F.2d 385, 387 (6 Cir.) cert. denied 338 U.S. 899. The existence of the power determines the classification of the employee. See *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, (6 Cir.) cert. denied 335 U.S. 908; *NLRB v. Leland Gifford Co.*, 200 F.2d 620 (1 Cir.).

Attendance at periodic meetings of management personnel is a strong indication of supervisory authority. *Borden Co.*, 157 NLRB No. 93; *Watkins Furniture Co.*, 160 NLRB No. 20; *Heck's Inc.*, 156 NLRB No. 73. In addition, the directing of the work force, transferring of employees, checking of production quality, distribution and scheduling of work all reveal supervisory authority. *Regency Electronics, Inc.*, 169 NLRB No. 49; *Johnson Metal Products*, 161 NLRB No. 76.

A further indication of supervisory capacity is that the assistant foremen were held out to be supervisors when their authority was explained to employees over whom they had authority. *Kane Bag Supply Co.* 173 NLRB No. 180; *Harvey Aluminum (Inc.)*, 156 NLRB No. 115. Recommendation of pay increases also indicates supervisory position, *Home Exterminating Co.*, 160 NLRB No. 108, as does the authority to control the behavior of employees. *I. Posner, Inc.* 145 NLRB 1190.

The exclusion of the supervisors would affect not only

the makeup of the unit, but additionally the validity of the showing of interest in the representation proceedings.

VII. Newly-Discovered Evidence Concerning the Supervisory Status of Ivory Scott and His Actions on Behalf of the Union Necessitate a Full and Complete Hearing in this Matter.

Respondent submits that the showing of interest in the representation case was clearly tainted by solicitation on behalf of the union by a supervisor — Ivory Scott. Respondent offers to prove in a full hearing that Ivory Scott:

- (a) admittedly withheld information in the representation hearing concerning his full responsibilities and authority as an assistant foreman for Respondent;
- (b) had the authority to and often did independently exercise such authority to:
 - (1) direct mixing of chemical solutions;
 - (2) direct plating operations;
 - (3) keep quality control records based on his own judgment of an employee's performance;
 - (4) correct employees' work;
 - (5) warn employees concerning their conduct and production;
 - (6) discharge employees;
 - (7) participate with other members of management in meetings to discuss employees' job performance, personnel policy, production problems, hiring of additional employees;
 - (8) discipline employees;
 - (9) recommend wage increases for employees working under his direction; and
 - (10) transfer employees from one job to another;
- (c) was introduced to employees as having the responsibility for directing the electroplating room;
- (d) was asked by officers and/or agents of the Union,

the United Steelworkers of America, AFL-CIO, to solicit authorization cards from employees of Respondent;

- (e) did, in fact, solicit authorization cards for the Union from Respondent's employees;
- (f) did, in fact, purposely make it known among the employees of Respondent that he was actively soliciting authorization cards for the Union and that he was further participating in its organization drive; and
- (g) did, in fact, give to the Union the numerous authorization cards which he obtained by his own solicitation, which cards were in turn submitted by the Union to the Regional Director in support of its representation petition.

Respondent submits the actions of Scott, a supervisor, in aiding the Union to obtain a sufficient showing of interest to support its petition for representation tainted said showing of interest so as to necessitate dismissal of the petition. That Scott acted as an agent of the Union is clear, not only from his having solicited for it, but also from its ratification of Scott's activities by using the cards to support its petition. See *International Woodworkers of America, AFL-CIO*, 13 NLRB 189.

In view of the substantive evidence which Respondent seeks to present, particularly the evidence that Scott admittedly withheld the full particulars of his responsibilities and authority and that he acted as an agent of the Union in soliciting cards, Respondent urges that it be given the opportunity to present such evidence at a full hearing.

VIII. Conclusion and Motion to Postpone Hearing.

For the reasons stated above Respondent urges that General Counsel's Motion for Summary Judgment be denied.

Furthermore, Respondent moves that the Trial Examiner postpone any hearing in the immediate case until such

time as the United States Supreme Court acts on its Petition for Writ of Certiorari and also renders its decision in the *Wyman-Gordon* case, since both cases will be decisive of some issues in this case and may well have a direct bearing upon the conduct of all parties to this hearing.

Respectfully submitted,
MAGNESIUM CASTING CO.
 by its attorneys
STONEMAN AND CHANDLER
 Original signed by:
LOUIS CHANDLER
 Original signed by:
JEROME H. SOMERS

Dated at Boston, Massachusetts
 December 31, 1968
 Post Office Address
 79 Milk Street
 Boston, Massachusetts 02109

[Certificate of Service Omitted]

[THE NATIONAL LABOR RELATIONS BOARD
 DIVISION OF TRIAL EXAMINERS
 WASHINGTON, D. C.]

[Title Omitted]

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding¹

Upon a petition filed under Section 9(e) of the National Labor Relations Act (29 U.S.C.A. 159(e)) by United Steelworkers of America, AFL-CIO, hereinafter called the Charging Party, a hearing was held by the Regional Direc-

¹ Administrative or official notice is taken of the record in the representation proceeding Case No. 1-RC19973, as the term "record" is defined in Section 102.68 and 102.69 (f) of the Board's Rules and Regulations Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB No. 81 enfd. 388 F. 2d 683 (C.A. 4, 1968).

tor for Region 1 of the Board at which the employer appeared specially arguing that the hearing should not be conducted because of the pendency of a charge filed by it against the Union alleging a violation of Section 8(b)(1) (A). The Motion was denied and the hearing was completed.

The Regional Director consequently issued a decision directing an election in a unit consisting of all production and maintenance employees of the employer at its Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. The Decision specifically dealt with a classification of alleged supervisors known as assistant foremen, six of whom were found to be employees and the seventh to be a supervisor and excluded from the unit.

On May 31, 1968, the Respondent filed a request for review pursuant to Section 102.67 of the Board's Rules and Regulations contending that three of the assistant foremen found to be employees are in fact supervisors and the Union filed its statement in opposition to the request for review. On June 18 the Board denied the request for review on the ground that it raised no substantial issues warranting review. On June 17 Respondent filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition contending that by furnishing an election eligibility list to the Union pursuant to the *Excelsior* rule,² Respondent had been required to lend assistance to the Union which necessarily would affect the results of the election. Respondent also contended that the rule was improperly promulgated and contrary to the requirements of the Administrative Procedure Act.

The Motion was denied on June 19 by the Regional Direc-

² *Excelsior Underwear, Inc.*, 156 NLRB 1236.

tor on the ground that the *Wyman-Gordon*³ decision of the First Circuit upon which Respondent rested its Motion does not provide for retroactive application. The election was conducted on June 21, 1968, and Respondents moved the District Court for the District of Massachusetts for a ruling enjoining the certification of the results of the election on the same grounds on which its motion to the Regional Director rested. The United States District Court granted the rule sought by Respondent and its action was summarily reversed by the United States Court of Appeals for the First Circuit.⁴

On June 28 the Respondent filed objections to conduct affecting the results of the election, again raising the "*Excelsior*" and the "*Wyman-Gordon*" issues and further alleging that prior to the election the Union informed employees that if they did not sign an authorization card they would have to pay \$75 initiation fee to the Union. The objections were overruled and the United Steelworkers of America was certified as the representative of the employees on October 11, 1968. Respondent by telegram to the Board excepted to the Supplemental Decision and Certification on the ground that the employer proposed to seek a writ of certiorari before the United States Supreme Court to the decision of the First Circuit Court of Appeals in which the District Court injunction was set aside. This exception was treated as a request for review and denied on the ground that it raised no substantial issues warranting review.

The Complaint Case

On October 22, 1968, the Union filed the unfair labor practice charge involved in the instant case, alleging that the employer refused to bargain with the Union as the exclusive collective-bargaining representative of Respond-

³ *Wyman-Gordon Company et al. v. N.L.R.B.*, 379 F.2d 394 (1968).

⁴ 69 LRRM 2235.

ent's employees in spite of the certification. On November 8, 1968, the Regional Director for Region 1 issued a Complaint and Notice of Hearing alleging that Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. On November 18 Respondent filed a Motion for a Bill of Particulars and on the 19th an Answer to the Complaint. The General Counsel filed an Opposition to the Motion for a Bill of Particulars giving certain additional particulars. On December 5 a Motion for Summary Judgment dated December 3 was filed with the Chief Trial Examiner by the Regional Director. Trial Examiner Schneider on December 6 issued an Order to Show Cause on the Motion for Summary Judgment to which Respondent replied on January 2, 1969.

Ruling on Motion for Summary Judgment

In its Opposition to the Motion for Summary Judgment the Respondent urges that the General Counsel's Motion should be denied for a number of reasons which may be summarized as follows:

1. The General Counsel omitted part of the background of the case notably the grounds on which the Regional Director denied the employer's Motion to Withdraw Decision and Direction of Election and Dismiss the Petition.
2. The complaint is premature since the Respondent has filed a Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit in its injunction proceeding and further the Supreme Court has agreed to review the *Wyman-Gordon* Decision wherefore the Board should not proceed with this matter until both actions by the Supreme Court have been consummated.
3. The General Counsel should be estopped from its

motion by the action of the General Counsel in granting certain assurances to Respondent that it is entitled to a full hearing.

4. The Decision of the First Circuit Court of Appeals in *Wyman-Gordon* constitutes newly-discovered evidence.
5. The representation election was not conducted according to rules promulgated in accordance with *Section 6* of the Act and is therefore invalid.
6. The appropriate unit should have included as supervisors the assistant foremen.
7. Newly-discovered evidence concerning the supervisory status of one Scott and his actions on behalf of the Union necessitate a full hearing.

Finally Respondent moved that the Trial Examiner postpone the hearing in the instant case until the Supreme Court acts on the petition for writ of certiorari and also renders its decision in the *Wyman-Gordon* case.

With respect to the first issue raised by Respondent concerning the omission of facts by the General Counsel, as I stated above, administrative notice has been taken of the record in the representation proceeding which includes the employer's Motion to Withdraw the Decision and Direction of Election, the denial by the Regional Director, the Request for Review and the Board's denial thereof. Accordingly, the facts allegedly omitted by the General Counsel are before the Trial Examiner and the Board.

With regard to Respondent's argument that the complaint issued by the General Counsel is premature, to the extent that Respondent's argument is predicated on the litigation of the validity of the *Excelsior* rule in the *Wyman-Gordon* case this matter has already been considered by the Board in the representation proceeding and will not be reconsidered herein. To the extent that the argument

is predicated on the filing of a petition for certiorari in the injunction proceeding Respondent cites no authority for the proposition that the Board's processes should be held up pending a determination by the Supreme Court of the United States whether to grant certiorari and presumably if certiorari is granted the period of time necessary for the Supreme Court to issue its decision. As the United States Court of Appeals for the First Circuit stated in its decision in *Magnesium Casting Co.*, F. 2d (September 10, 1968) "labor matters should proceed promptly." I am not convinced by Respondent's argument especially in view of the fact that Respondent's petition for a writ of certiorari does not necessarily speak to the validity of the election.

Regarding Respondent's argument that the General Counsel should be estopped by alleged assurances by General Counsel Ordman that Respondent is entitled to a full and complete hearing, the alleged assurances are contained in a letter which recites the provisions of Section 10(b) of the National Labor Relations Act that any person charged with the commission of an unfair labor practice must be served with a complaint stating the charges and a notice of hearing. The notice of hearing sets the time and place of the hearing and advises a Respondent that it is entitled to participate fully and present whatever evidence it has in support of its position to a duly designated trial examiner.

The General Counsel's letter goes on to state "the Act also provides that such proceedings 'shall so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States....'" The Board and the courts have many times had occasion to consider whether the language quoted above constitutes a requirement that a hearing be conducted in cases such as this. A recent case in which this issue was raised is *El-Ge Potato Chip Company, Inc.*, 173 NLRB

No. 19 in which the Trial Examiner quoted from the Board decision in *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36 fn.9 "where there are no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is normally granted. There is no absolute right to a hearing." The United States Court of Appeals for the Fifth Circuit put it succinctly in *N.L.R.B. v. Air Control Window Products of St. Petersburg*, 335 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality."

The letter of the General Counsel does not constitute a waiver but on the contrary it refers to language which the Board and the courts have so many times construed that the construction must be read together with language. I reject the argument.

Respondent contends that the decision of the court in the *Wyman-Gordon* case and the "imminent decision of the United States Supreme Court in the same case" constitutes newly discovered evidence. Respondent does not indicate in what regard it considers that the decisions of courts constitute evidence nor, other than asserting the fact, do they argue so. However whether viewed as evidence or legal authority the contention was raised before the Board in the representation proceeding and rejected. The same must be said of Respondent's contention that the representation election was not conducted according to rules promulgated in accordance with Section 6 of the Act and is invalid. Respondent's reference therein is to the fact that the *Wyman-Gordon* decision found the "*Excelsior*" rule invalid because it was not published as a rule but laid down in a decision. Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavail-

able evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.⁵ Respondent does not assert that any special circumstances exist other than its characterization of the decisional authorities in the *Wyman-Gordon* case as evidence and a contention that there is newly discovered evidence concerning the supervisory status of Ivory Scott, one of the assistant foremen.

In its Reply Respondent submits that Ivory Scott "admittedly withheld information in the representation hearing concerning his full responsibilities and authority as an assistant foreman for Respondent and that Scott solicited authorization cards for the Union and participated in its organizational drive." The only construction that I can make of Respondent's Reply is that it views Scott's "admission" as newly discovered evidence, however Respondent furnishes no support for its contention other than offering to prove in a full hearing that Scott had supervisory authority and did various acts consistent thereto, each of which particulars was litigated and considered in the hearing in the representation case. To what extent such evidence is new is impossible to determine other than Scott's admission which presumably came after the hearing and of which we know nothing. The evidence which Respondent offers to adduce is evidence which Respondent must have had prior to the representation case hearing. With regard to the fact that Scott solicited authorization cards and participated in the Union's organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact. New evidence on an irrele-

⁵ *Howard Johnson Company*, 164 NLRB No. 121; *Winfield Manufacturing Co., Inc.*, 173 NLRB No. 103; *El-Ge Potato Chip Company, Inc.*, *supra*, and all the cases therein cited on this point.

vant issue is certainly not grounds for a hearing. The issue as to the inclusion of the assistant supervisors was vigorously contested at the representation hearing. No reason is given for failure to offer evidence such as Respondent recites at that time, if in fact it was not offered. There is no showing that the testimony was not then available or that it could not have been obtained and adduced with the exercise of reasonable diligence. Under these circumstances reopening the representation hearing at this stage of the proceeding is not warranted.⁶ I find the Respondent's contention unsubstantiated.

Finally Respondent moves to postpone the hearing until the decision of the Supreme Court on its petition for writ of certiorari. Inasmuch as I have found that no hearing is necessitated herein the Motion must be denied.

There being no unresolved issues requiring an evidential hearing the Motion of the General Counsel for Summary Judgment is granted and I hereby make the following:

Findings and Conclusions

I. Jurisdiction and Labor Organization

It is admitted in the answer and therefore found (1) that the Respondent is engaged in commerce within the meaning of 2(6) and (7) of the Act and (2) that the Union is a labor organization within the meaning of the Act.

II. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The Unit

The following employees at the Respondent's Hyde Park, Massachusetts plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

⁶ *Goldspot Dairy, Inc.*, 173 NLRB No. 151, Cf., *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.A. 10, 1964) therein cited.

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

2. The Certification

On June 21, 1968, the majority of the employees in the unit described above by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board designated the Union as the representative for the purpose of collective bargaining with Respondent, and on October 11, 1968, the Regional Director for the First Region certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The Request to Bargain and the Respondent's Refusal*

On or about October 22, 1968, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above.⁷

At all times since on or about October 22, 1968, the Respondent has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly I find that Respondent has refused to bargain collectively with the Union as the exclusive bargaining

⁷ Although Respondent in its answer denied that the Union requested Respondent to bargain it has at no point in the proceeding controverted this fact and its answer and particularly its Reply to the Order to Show Cause make it ultimately clear that it has and continues to refuse to bargain.

representative of the employees in the appropriate unit and that by such refusal the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

III. The Effect of the Unfair Practices Upon Commerce

The acts of the Respondent as set forth in Section II above occurring in connection with its operations as found in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their collective-bargaining agent for the period provided by law I shall recommend that the initial year of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Pacific Intermountain Express Company*, 173 NLRB No. 75; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 enfd. 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817.

Conclusions of Law

1. Magnesium Casting Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Magnesium Casting Co. employed at its Hyde Park, Massachusetts plant including the record keeping department employees, shipping and receiving employees, and the truck-driver exclusive of its office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 22, 1968, the above-named labor organization has been certified as the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 22 and at all times since to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Magnesium Casting Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargaining collectively concerning wages, hours and other terms and conditions of employment with United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate units.

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Hyde Park, Massachusetts place of business copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for

⁸ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

60 consecutive days thereafter including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director for Region 1 in writing within 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply therewith.⁹

Dated at Washington, D. C. January 28, 1969

(s) PAUL E. WEIL,
Trial Examiner

⁹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER
OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request bargain with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees employed at our Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees,

guards and all supervisors as defined in Section 2(11) of the Act.

MAGNESIUM CASTING CO.
(Employer)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, John F. Kennedy Federal Bldg., 20th Floor, Cambridge & New Sudbury Streets, Boston, Mass. 02203 (Tel. No. 617-223-3300).

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

EXCEPTIONS TO TRIAL EXAMINER'S DECISION

Now comes the Respondent and excepts to the following statements, findings, ruling and conclusions of the Trial Examiner (full discussion of the issues raised herein is found in the brief) :

1. To the statement on page 2, lines 24 through 30:

"The Motion was denied on June 19 by the Regional Director on the ground that the *Wyman-Gordon*³ decision of the First Circuit upon which Respondent rested its Motion does not provide for retroactive application. The election was conducted on June 21, 1968, and Respondent moved the District Court for the District of Massachusetts for a ruling enjoining the certification of the results of the election on the same grounds on which its motion to the Regional Director rested."

for the reason that it is incomplete.

³ *Wyman Gordon Company et al v. N.L.R.B.*, 379 F. 2d 394 (1968).

2. To the ruling on page 4, lines 9 through 13:

"With regard to Respondent's argument that the complaint issued by the General Counsel is premature, to the extent that Respondent's argument is predicated on the litigation of the validity of the *Excelsior* rule in the *Wyman-Gordon* case this matter has already been considered by the Board in the representation proceeding and will not be reconsidered herein."

for the reason that this matter directly affects the legality of the position of the United Steelworkers of America, AFL-CIO as the alleged exclusive collective bargaining representative of the alleged appropriate unit, and is not a matter strictly limited to the representation proceeding.

3. To the statement and finding on page 5 lines 41 through 52:

"The Board and the courts have many times had occasion to consider whether the language quoted above constitutes a requirement that a hearing be conducted in cases such as this. A recent case in which issue was raised is *El-Ge Potato Chip Company, Inc.*, 173 NLRB No. 19 in which the Trial Examiner quoted from the Board decision in *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36 fn. 9 'where there are no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is normally granted. There is no absolute right to a hearing.' The United States Court of Appeals for the Fifth Circuit put it succinctly in *N.L.R.B. v. Air Control Window Products of St. Petersburg*, 335 F. 2d 245, 249 (C.A. 5, 1964): 'If there is nothing to hear, then

a hearing is a senseless and useless formality.' " for the reason that they are irrelevant, easily distinguished from the facts in the present case and distort the facts in the present case.

4. To the finding on page 5, lines 1 through 4:

"The letter of the General Counsel does not constitute a waiver but on the contrary it refers to language which the Board and the courts have so many times construed that the construction must be read together with language. I reject the argument."

for the reason that it is unsupported by the evidence on the record.

5. To the statement on page 5, lines 6 through 12:

"Respondent contends that the decision of the court in the *Wyman-Gordon* case and the 'imminent decision of the United States Supreme Court in the same case' constitutes newly discovered evidence. Respondent does not indicate in what regard it considers that the decisions of courts constitute evidence nor, other than asserting the fact, do they argue so. However whether viewed as evidence or legal authority the contention was raised before the Board in the representation proceeding and was rejected."

for the reason that it is contrary to law and fact.

6. To the statement on page 5, lines 12 through 17:

"The same must be said of Respondent's contention that the representation election was not conducted according to rules promulgated in accordance with Section 6 of the Act and is invalid. Respondent's reference therein is to the fact that the *Wyman-Gordon* decision found the '*Excelsior*'

rule invalid because it was not published as a rule but laid down in a decision."

for the reason that it is contrary to law.

7. To the statement on page 5, lines 17 through 19:

"Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding."

for the reason that it is submitted that newly discovered evidence or special circumstances have arisen necessitating a full hearing on such issues.

8. To the statement on page 5, lines 19 through 27:

"In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.⁵ Respondent does not assert that any special circumstances exist other than its characterization of the decisional authorities in the *Wyman-Gordon* case as evidence and a contention that there is newly discovered evidence concerning the supervisory status of Ivory Scott, one of the assistant foremen."

⁵ *Howard Johnson Company*, 164 NLRB No. 121; *Winfeld Manufacturing Co., Inc.*, 173 NLRB No. 103; *El-Ge Potato Chip Company, Inc.*, *supra*, and all the cases therein cited on this point.

for the reason that the decision in *Wyman-Gordon Company et al v. NLRB*, 379 F. 2d 394 (1968) and the prospective decision of the Supreme Court of the United States on the Writ of Certiorari from that case, and the admission after the hearing by Supervisor Scott constitute such special circumstances and newly

discovered evidence as to necessitate a full hearing before a trial examiner of the issues raised and outlined in the Respondent's Reply to the Show Cause Order.

9. To the statement on page 5, lines 33 through 38:
“The only construction that I can make of Respondent's Reply is that it views Scott's ‘admission’ as newly discovered evidence, however, Respondent furnished no support for its contention other than offering to prove in a full hearing that Scott had supervisory authority and did various acts consistent thereto, each of which particulars was litigated and considered in the hearing in the representation case.”
for the reason that it is unsupported by the evidence on the record.
10. To the statement on page 5, lines 38 through 42:
“To what extent such evidence is new is impossible to determine other than Scott's admission which presumably came after the hearing and of which we know nothing. The evidence which Respondent offers to adduce is evidence which Respondent must have had prior to the representation case hearing.”
for the reason that it is contradictory, mere conjecture and prejudicial to Respondent's rights of due process.
11. To the statement on page 5, lines 42 through 45:
“With regard to the fact that Scott solicited authorization cards and participated in the Union's organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact.”

for the reason that it is irrelevant and unsupported by the facts since newly discovered evidence and special circumstances reveal those facts to be inaccurate and false.

12. To the statement on page 5, lines 47 through 50:

"No reason is given for failure to offer evidence such as Respondent recites at that time, if in fact it was not offered. There is no showing that the testimony was not then available or that it could not have been obtained and adduced with the exercise of reasonable diligence."

for the reason that it is contrary to the facts alleged in the Reply to the Show Cause Order and to the facts which Respondent offers to develop further in a full hearing before a Trial Examiner.

13. To the statement on page 5, lines 50 through page 6, line 3:

"Under these circumstances reopening the representation hearing at this state of the proceeding is not warranted.⁶ I find the Respondent's contention unsubstantiated."

⁶ *Goldspot Dairy, Inc.*, 173 NLRB No. 151 Cf., *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.A. 10, 1964) therein cited.

for the reason that it is error in law and in fact.

14. To the finding on page 6, lines 25 through 36:

" 1. The Unit

The following employees at the Respondent's Hyde Park, Massachusetts plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act."

for the reason that it is unsupported in both law and fact and that the assistant foremen in the Products Division should be excluded from the unit appropriate for collective bargaining.

15. To the finding on page 6, lines 38 through 46:

" 2. The Certification

On June 21, 1968, the majority of the employees in the unit described above by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board designated the Union as the representative for the purpose of collective bargaining with Respondent, and on October 11, 1968, the Regional Director for the First Region certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative."

for the reason that said election was conducted in violation of Section 6 of the Act and was, therefore, void.

16. To the finding on page 6, lines 49 through page 7, line 3:

" B. *The Request to Bargain and the Respondent's Refusal*

On or about October 22, 1968, the Union re-

quested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above.⁷

⁷ Although Respondent in its answer denied that the Union requested Respondent to bargain it has at no point in the proceeding controverted this fact and its answer and particularly its Reply to the Order to Show Cause make it ultimately clear that it has and continues to refuse to bargain.

for the reason that it is unsupported in both law and fact.

17. To the finding on page 7, lines 5 through 7:

“At all times since on or about October 22, 1968, the Respondent has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.”

for the reason that it is unsupported in both law and fact.

18. To the finding on page 7, lines 9 through 13:

“Accordingly I find that Respondent has refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit and that by such refusal the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

for the reason that it is unsupported in both law and fact.

19. To the finding on page 7, lines 15 through 22:

“ III. The Effect of the Unfair Practices
Upon Commerce

The acts of the Respondent as set forth in Section II above occurring in connection with its operations as found in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

for the reason that it is unsupported in both law and fact.

20. To the remedy on page 7, lines 24 through 40:

"The Remedy'

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their collective-bargaining agent for the period provided by law I shall recommend that the initial year of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Pacific Intermountain Express Company*, 173 NLRB No. 75; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 enfd. 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817.

for the reason that it is not justified by the law or the facts.

21. To the conclusion on page 8, lines 1 through 7:
“3. All production and maintenance employees of Magnesium Casting Co. employed at its Hyde Park, Massachusetts plant including the record keeping department employees, shipping and receiving employees, and the truckdriver exclusive of its office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.”
for the reason that it is unsupported in both law and fact and that assistant foremen in the Products Division should be excluded from the unit appropriate for collective bargaining.
22. To the conclusion on page 8, lines 9 through 12:
“4. Since October 22, 1968, the above-named labor organization has been certified as the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.”
for the reason that such certification was an error in law and in fact.
23. To the conclusion on page 8, lines 14 through 18:
“5. By refusing on or about October 22 and at all times since to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.”

for the reason that it is unsupported in both law and fact.

24. To the conclusion on page 8, lines 20 through 24:

"6. By the aforesaid refusal to bargain Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

for the reason that it is unsupported in both law and fact.

25. To the conclusion on page 8, lines 25 through 27:

"7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act."

for the reason that it is unsupported in both law and fact.

26. To the recommended order on page 8, line 29 through page 9, lines 16:

"**RECOMMENDED ORDER**

Magnesium Casting Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours and other terms and conditions of employment with United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate units.

All production and maintenance employees employed at Respondent's Hyde Park, Massachu-

sets plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Hyde Park, Massachusetts place of business copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said no-

⁸ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

ties are not altered, defaced or covered by any other material.

(e) Notify said Regional Director for Region 1 in writing with 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply therewith.⁹"

⁹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

for the reason that such order and notice are unwarranted by the facts and by the law.

For all of the above considerations which shall be further discussed in its brief in support of these Exceptions to the Trial Examiner's Decision, Respondent urges that the Complaint in its entirety be dismissed or in the alternative that the Board reverse the Trial Examiner's Decision and remand the case to a new trial examiner for a full hearing as requested on the issues raised in Respondent's Reply to Show Cause Order.

Respectfully submitted,
MAGNESIUM CASTING COMPANY
By its attorneys
STONEMAN AND CHANDLER
(s) LOUIS CHANDLER
(s) JEROME H. SOMERS

Dated at Boston, Massachusetts
February 28, 1969

Post Office Address:
79 Milk Street
Boston, Massachusetts 02109

[CERTIFICATE OF SERVICE OMITTED]

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

DECISION AND ORDER

On January 28, 1969, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and Respondent filed a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations¹ of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the

¹ In its exceptions to the Trial Examiner's Decision, the Charging Party requests an affirmative bargaining order, without any further request that the Respondent bargain with it, and a monetary remedy to, *inter alia*, make the employees and it whole for losses they may have suffered as a result of the Respondent's unlawful refusal to bargain. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the said request. See *Monroe Auto Equipment Company*, 164 NLRB No. 144, footnote 1.

Trial Examiner, and hereby orders that the Respondent, Magnesium Casting Company, Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. April 17, 1969.

FRANK W. McCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
SAM ZAGORIA, *Member*
NATIONAL LABOR RELATIONS BOARD

[SEAL]

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

MOTION FOR RECONSIDERATION

Comes now Magnesium Casting Co., Respondent in the above-entitled matter, and pursuant to Section 102.48(d) of the Board's Rules and Regulations moves the Board reconsider its Decision and Order, dated April 17, 1969, for the reason that the Board denied, on June 18, 1968, the Employer's Request for Review, dated May 31, 1968, subsequent to the representation hearing on the ground that it raised "no substantial issues warranting review" (see Ex. B and C. attached to Motion for Summary Judgment.) and later granted General Counsel's Motion for Summary Judgment in the above-entitled case, such conduct by the Board being in violation of Section 29 U.S.C. Sec. 160(e), wherein Congress stated that the Board must rule whether a litigant has committed an unfair labor practice. Respondent urges that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether the Regional Director's decision was right violates the Act, as held in *Pepsi-Cola Buffalo Btlg. Co. v. NLRB*, (USCA 2, 1967) 70 LRRM 3185, a case decided on

March 25, 1969, following submission of Brief in the immediate case.

Crucial to the merits of the unfair labor practice case is the determination of the supervisory capacity of employee Ivory Scott, called an assistant foreman, who actively solicited authorization cards, as an agent for the union, and submitted these cards to support the union's showing of interest in its petition for a representation election, the results of which form the basis for the union's claim to be the employees' duly chosen exclusive collective bargaining agent. Furthermore, Scott actively campaigned and solicited votes for the union as an agent of the union, behavior which violates Section 8(b)(1)(A) of the Act. The total behavior of Scott, Respondent asserts, required the Regional Director to dismiss the petition since the showing of interest was tainted and the activity of Scott constituted an unfair labor practice, as alleged by Respondent in its charge in Case No. 1-CB-1362.

Following the filing by the union of a petition for representation, a hearing was held at which time the supervisory authority of a number of employees, including Ivory Scott, was contested. Simultaneously a charge filed by Respondent was pending in Case No. 1-CB-1362, alleging the union violated 8(b)(1)(A) by having Scott act as its agent in soliciting authorization cards, used to support the union's petition, and engaging in other conduct in support of the union tending to restrain and coerce employees in the exercise of their Section 7 rights. On the basis of the evidence adduced at the hearing, the Regional Director concluded that Scott, among others, was not a supervisor and directed an election.

The Request for Review filed by the Respondent was denied on the ground that it raised "no substantial issues warranting review." Following an election in which the union received a majority, Respondent refused to bargain

and raised as part of its defense the supervisory authority of Ivory Scott and the acts of Scott as agent for the union. The General Counsel moved for summary judgment, which was granted by the Trial Examiner, who refused to review the Regional Director's Decision, stating (Trial Examiner's Decision p. 5, 1. 17-23) :

Equally the contention that the appropriate unit should have excluded the assistant foremen was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.

That the Trial Examiner relied on the findings on the Regional Director is clear (Trial Examiner's Decision p. 5, 1. 42-44) :

With regard to the fact that Scott solicited authorization cards and participated in the union organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact.

The Trial Examiner's statement that the Board found Scott to be a supervisor is clearly erroneous, since the Board did *not* decide the issue, but in fact merely refused to review the record and to make its own decision. The Trial Examiner and the Board also refused to review the record independently of the Regional Director's conclusions on this issue, as is evident from the failure of both to discuss the merits of the issue of Scott's supervisory authority.

Respondent urges that the standards for review in Section 102.67(e) of the Board's Rules and Regulations run contrary to the intent of Congress since they prevent Respondent from having the Board, as Congress specifically

designated, make the final decision in unfair labor practice cases. The tests for the granting of review are narrow and confining and in most cases where a question of law or policy is not an issue, review will be granted solely on a finding by the Board, based on the Request for Review which must be a "self-contained" document enabling the Board to rule without the necessity of recourse to the record (Section 102.67(d)), that the Regional Director's decision was "clearly erroneous" and there are "compelling reasons" for review. By seeking to avoid "relitigation" of matters, the Board is shirking its responsibility to decide unfair labor practice. See 29 U.S.C. Sec. 160(c); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Circuit Judge Kaufman, writing the Opinion in *Pepsi-Cola Buffalo Btlg. Co. v. NLRB*, *supra*, stated at 3187

In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 20 LRRM 2115 (1947); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 19 LRRM 2397 (1947).

On the basis of the above discussion, Respondent requests the Board to review the Decision of the Regional Director and to make its own decision as to whether the Regional Director's determination was correct. Respondent also reserves the defenses raised in its original Exceptions and Brief in Support of Exceptions, despite the limited nature of this Motion for Reconsideration.

Respectfully submitted,

MAGNESIUM CASTING COMPANY
By its attorneys
STONEMAN AND CHANDLER
/s/ LOUIS CHANDLER
/s/ JEROME H. SOMERS

Dated at Boston, Massachusetts

April 29, 1969

Post Office Address:

79 Milk Street

Boston, Massachusetts 02109

(CERTIFICATE OF SERVICE)

[NATIONAL LABOR RELATIONS BOARD]

[Title Omited]

ORDER DENYING MOTION

On January 28, 1969, Trial Examiner Paul E. Weil of the National Labor Relations Board issued his Decision in the above-entitled proceeding. The Trial Examiner took administrative notice of the record in a related representation proceeding, Case 1-RC-9973, in which the Regional Director in his Decision and Direction of Election, had found, *inter alia*, that Ivory Scott was not a supervisor; the Board had denied review of the Regional Director's finding and the Regional Director had certified the Union. After consideration of the record in the instant case, the Trial Examiner concluded that there were no unresolved issues requiring an evidential hearing. He, therefore, granted the General Counsel's Motion for Summary Judgment, found that the Respondent had refused to bargain with the certified Union in violation of Section 8(a) (5) and (1) of the Act, and recommended that it cease and

desist therefrom and bargain with the Union. The Board, on April 17, 1969, issued a Decision and Order¹ in which it adopted the Trial Examiner's findings, conclusions and recommendations as contained in his Decision, and ordered that the Respondent take the action set forth in the Trial Examiner's Recommended Order.

Thereafter, on May 1, 1969, the Respondent filed a motion for reconsideration of the Board's Decision and Order, contending that the Board's failure to review the record before the Regional Director in Case 1-RC-9973 for the purpose of making its own decision that Ivory Scott was not a supervisor is in violation of the National Labor Relations Act, as held by the United States Court of Appeals for the Second Circuit in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, — F.2d —, (March 25, 1969), petition for rehearing denied May 15, 1969. The Respondent requests that the Board independently review the Regional Director's decision and determine whether or not the Regional Director's decision that Ivory Scott was not a supervisor was correct.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion for reconsideration be, and it hereby is, denied as lacking merit.²

Dated, Washington, D. C., August 11, 1969

By direction of the Board:

/s/ GEORGE A. LEET

Associate Executive Secretary

² With due deference to the Second Circuit's decision in *Pepsi-Cola Buffalo Bottling Company v. N.L.R.B.*, supra, the Board disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise.

[NATIONAL LABOR RELATIONS BOARD]

[Title Omitted]

**MOTION TO REOPEN HEARING AND TO
ADDUCE ADDITIONAL EVIDENCE**

Comes now Magnesium Casting Company, Respondent in the above-entitled matter, and pursuant to Section 102, 48(d) of the Board's Rules and Regulations, moves the Board for leave to adduce the following additional evidence and to reopen the record:

(1) Of the two hundred fifty-seven (257) employees in the unit the Board deemed appropriate who were on the election eligibility list for the payroll period ending May 22, 1968, one hundred seventy-eight (178) employees are no longer employed.

(2) Presently there are two hundred forty-two (242) new employees who were not on the eligibility list to vote in the election of June 21, 1968.

(3) Presently there are three hundred twenty-one (321) employees in the unit the Regional Director deemed appropriate, of which approximately eighty (80) were employed and on the eligibility list to vote in the election of June 21, 1968.

(4) The turnover described in (1), (2) and (3) above resulted substantially from normal attrition and from fluctuations in employment requirements which are dependent upon variations in customer commitments.

Respondent respectfully submits that the above evidence based on its current payroll records, requires the Board to modify its order dated April 17, 1969, so as to eliminate the requirement that Respondent engage in collective bargaining with the United Steelworkers of America, AFL-CIO. The dissolution of the alleged majority occurred as a result of factors devoid of any evidence of unfair labor practices by Respondent. That the alleged majority cannot possibly exist is a mathematical certainty, since *only twenty-*

five percent (25%) of the employees on the eligibility list are presently employed. In view of the change in the identity of the employees, the course of action required in the Board's order is markedly inconsistent with the purposes of the Act — namely, to permit employees to freely choose whether or not they wish to be represented in collective bargaining and, if so, by whom. *Clark's Gamble Corp. v. NLRB*, (CA 6, 1969) 70 LRRM 2625.

In *NLRB v. Superior Fireproof Door & Sash Co.*, (CA 2, 1961) 289 F.2d 713, 47 LRRM 2816, under comparable facts to the case at bar the Court modified a Board bargaining order and ordered a new election. Equally applicable in the immediate case is the reasoning of the Court, at 2824:

"We are fully cognizant of the arguments why in many cases a certified union ousted by unfair labor practices of an employer should not be subjected to an election, but these have more force in cases of illegal assistance to a rival union or of the violent anti-union practices of earlier years than to anything shown here; and their force also must diminish with the passage of time. *Nor may we forget that the interests to be protected are primarily those of the employees*

(emphasis added)

In the present case it is important to note that the Company has not been charged with anti-union practices. See also *NLRB v. Adhesive Products Corp.*, (CA 2, 1960) 280 F.2d 89, 46 LRRM 2685; *Marcus Trucking Co.*, (CA 3, 1961) 286 F.2d 583, 47 LRRM 2524.

In *NLRB v. Koppel Co.*, (CA 3, 1969) 71 LRRM 2531, 2535, fn. 16, the Court urged the Board to consider whether the evidence to be adduced at a remanded hearing establishes that the change in identity of the Company's employees has been substantial and if so, consider the propriety of issuing a bargaining order as against ordering

an election. As Judge Anderson stated in *NLRB v. Fomatic Corp.*, (CA 2, 1965) 347 F.2d 74, at 78, 59 LRRM 2535, we should not "unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees."

In view of the new evidence outlined above which Respondent seeks to adduce at a hearing and its effect upon the Board's final order as it pertains to the purposes of the Act — namely, to protect the employees' free choice to engage in or to refrain from engaging in organizational activity for the purpose of collective bargaining or to determine who, if they so wish, shall be their collective bargaining agent, Respondent urges the Board to grant this motion for leave to reopen the hearing to adduce the additional evidence.

Respectfully submitted,
STONEMAN AND CHANDLER
/s/ LOUIS CHANDLER
/s/ JEROME H. SOMERS

September 25, 1969
79 Milk Street
Boston, Massachusetts 02109
[CERTIFICATE OF SERVICE OMITTED]

[NATIONAL LABOR RELATIONS BOARD]
[Title Omitted]

ORDER DENYING MOTION

On January 28, 1969, Trial Examiner Paul E. Weil of the National Labor Relations Board issued his Decision in the above-entitled proceeding. The Trial Examiner took administrative notice of the record in a related representation proceeding, Case 1-RC-9973, in which the Regional Director, in his Decision and Direction of Election, had found, *inter alia*, that Ivory Scott was not a supervisor; the Board had denied review of the Regional Director's finding; and

the Regional Director had certified the Union. After consideration of the record in the instant case, the Trial Examiner concluded that there were no unresolved issues requiring an evidential hearing. He, therefore, granted the General Counsel's Motion for Summary Judgment, found that the Respondent had refused to bargain with the certified Union in violation of Section 8(a)(5) and (1) of the Act, and recommended that it cease and desist therefrom and bargain with the Union. The Board, on April 17, 1969, issued a Decision and Order¹ in which it adopted the Trial Examiner's findings, conclusions and recommendations as contained in his Decision, and ordered that the Respondent take the action set forth in the Trial Examiner's Recommended Order.²

Thereafter, on September 26, 1969, the Respondent filed a motion to reopen the hearing to adduce additional evidence, contending that the turnover of employees and expansion of the unit since the election requires the Board to modify its April 17, 1969, Order and eliminate the Respondent's obligation to bargain with the Union. The General Counsel and the Charging Party filed opposition to the motion.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion to reopen the hearing and to adduce additional evidence be, and it hereby is, denied as lacking in merit.

Dated, Washington, D. C., October 22, 1969

By direction of the Board:

GEORGE A. LEET

Associate Executive Secretary

¹ 175 NLRB No. 68.

² The Board on August 11, 1969, denied as lacking in merit the Respondent's motion for reconsideration of the Regional Director's decision in Case 1-RC-9973 that Ivory Scott was not a supervisor.

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

[Title Omitted]

APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States

Court of Appeals for the First Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully applies to this Court for the enforcement of its Order against Respondent, its officers, agents, successors, and assigns, Case No. 1-CA-6498.

In support of this application the Board respectfully shows:

(1) Respondent is engaged in business in the State of Massachusetts, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this application by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) On December 3, 1968, the General Counsel filed a motion for summary judgment, requesting that an order for summary judgment be entered. On the same date, an order referring motion for summary judgment was referred to the Trial Examiner. On December 6, 1968, the Trial Examiner issued an order to show cause on motion for summary judgment. On January 2, 1969, the Respondent filed an answer to the order to show cause. Thereafter, on January 28, 1969, the Trial Examiner issued his Decision in which he *inter alia* granted the General Counsel's Motion for Summary Judgment.

(3) Upon due proceedings had before the Board in said matter, the Board on April 17, 1969, duly stated its find-

ings of fact and conclusions of law and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the Board will certify and file with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this application and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 10th day of November 1969

[Certificate of Service Omitted]

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

[Title Omitted]

ANSWER TO PETITION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the First Circuit:

Respondent, Magnesium Casting Company, answering the petition for enforcement of an order of the National Labor Relations Board, which petition has been filed herein by the National Labor Relations Board, respectfully shows as follows:

1. Respondent admits the allegations stated in paragraph 1 bearing upon the jurisdiction of the Court but denies that it committed any unfair labor practices.

2. Respondent admits that the General Counsel filed a Motion for Summary Judgment, that said Motion was referred to the Trial Examiner, that the Trial Examiner issued an Order to Show Cause on said motion, that Respondent filed an Answer to the Order to Show Cause and that the Trial Examiner issued his Decision granting said Motion, all on the stated dated in paragraph 2.

3. Respondent admits the issuance of the Board's order and its service upon Respondent, but denies that due proceedings were had before the Board prior to issuance of the Board's Order.

4. Respondent respectfully urges:

- a) that the Decision and Order of the Board are without foundation in law, and are contrary to law;
- b) that the Respondent was denied due process in the proceedings before the Trial Examiner and the Board;
- c) that the findings of fact are not supported by substantial evidence on the record as a whole.

WHEREFORE, Respondent, Magnesium Casting Company, prays this Honorable Court, that it make and enter its decree denying the Petition for Enforcement and vacating the Order of the National Labor Relations Board.

Respectfully submitted,
MAGNESIUM CASTING COMPANY
By its Attorneys
STONEMAN AND CHANDLER
By (s) LOUIS CHANDLER
LOUIS CHANDLER
By (s) JEROME H. SOMERS
JEROME H. SOMERS

Dated at Boston, Massachusetts

December 1, 1969

Post Office Address:

79 Milk Street

Boston, Massachusetts 02109

[Certificate of Service Omitted]

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

No. 7462.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
MAGNESIUM CASTING COMPANY,
RESPONDENT,
and
UNITED STEELWORKERS OF AMERICA,
INTERVENOR.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and BOWNES
District Judge.

Abigail Cooley Baskir, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Marshall F. Berman*, Attorney, were on brief, for petitioner.

Jerome H. Somers, with whom *Louis Chandler* and *Stoneman and Chandler* were on brief, for respondent.

May 21, 1970.

COFFIN, *Circuit Judge*. On the basis of the evidence adduced at a unit determination hearing on March 14, 1968, the Regional Director concluded that six of the seven assistant foremen whose status was in dispute were employees rather than supervisors and thus includable in the proposed bargaining unit at the Magnesium Casting Company plant in Hyde Park, Massachusetts. The Company's Request for Review, contending that three of the six — Scott, Morris, and Massey — were supervisors, was denied

by the Board as raising no substantial issues warranting review. On June 21, the United Steelworkers of America won the election 140 to 59.

Pursuing the accepted method for challenging such unit determinations, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-477 (1964), the Company refused to bargain with the Union. The Company's answer to the ensuing unfair labor practice complaint renewed the contention concerning the status of Scott, Morris, and Massey. In response to the General Counsel's Motion for Summary Judgment, the Company asserted the existence of newly discovered evidence concerning Scott's status and his activities on behalf of the Union. The Trial Examiner granted the Motion for Summary Judgment, concluding that the Company's evidence regarding Scott was not newly discovered and thus that the Regional Director's determination in the representation proceeding should be followed. The Board affirmed the Summary Judgment and adopted the Trial Examiner's conclusion that the Company had committed an unfair labor practice by its refusal to bargain.

Thereafter, the Company filed a Motion for Reconsideration with the Board, contending that the holding in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676 (2d Cir. 1969), *cert. denied*, 396 U.S. 904 (1969), required the Board to make its own findings of fact regarding the status of Scott, Morris, and Massey. Noting its disagreement with the *Pepsi-Cola* rule, the Board denied the Motion, and comes to us seeking enforcement of its order to bargain.

I.

The Company's initial contention is that the inclusion of Scott, Morris, and Massey in the bargaining unit was improper because all three are supervisors within the meaning of the NLRA, 29 U.S.C. § 151 *et seq.* Under section 9 of the Act, only "employees" are properly includable in a bargaining unit, which provision combines with the sec-

tion 2(3) definition of "employee" to exclude from the bargaining unit "any individual employed as a supervisor". Section 2(11) defines "supervisor" as

"... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[Emphasis added.]

Since the definition is set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer "supervisory" status, e.g., *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1089 (8th Cir. 1969), as long as "such authority is not merely of a routine or clerical nature, but requires the use of independent judgment". See, e.g., *Amalgamated Clothing Workers v. N.L.R.B.*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

Nevertheless, as Judge Woodbury stated in *N.L.R.B. v. Swift and Company*, 292 F.2d 561, 563 (1st Cir. 1961),

"... the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'."

With that in mind, the Regional Director's determination should be sustained if supported by substantial evidence.

The instant case presents one of those situations where

the gradations of authority are particularly difficult to ascertain. The company has approximately 250 employees in the unit found appropriate, some 22 of whom work in the Products Division. Within that Division there are two sections—one for plating and finishing, another for assembly and packaging—each with 10-12 men under the supervision of a foreman, both of whom are conceded to be "supervisors." It is within these 10-12 man sections that the present controversy arises. The Company contends that all four assistant foremen are also supervisors; the Regional Director found that only Zagrafos—who worked with 9 employees and had exercised supervisory powers on several occasions—was a supervisor, and that Morris, Massey, and Scott were not.

Morris and Massey are employed in the assembly and packaging section of the Products Division. Working with 2-4 others in separate groups, each performs routine supply and inspection functions in addition to the normal packaging work of the section. Both are paid somewhat more than their fellow workers, but substantially less than their foreman. Neither has ever exercised any of the powers specified in section 2(11).¹ Both refer any important decisions to their foreman, who makes the daily work assignments and checks the work of each of the men in the section, including Morris and Massey, at regular 10 minute intervals throughout the working day. Whatever responsibility these assistant foremen may have vis-a-vis their fellow workers, it is of a fairly routine nature; while some judgment is obviously required to determine what problems

¹ We accept the proposition that possession of section 2(11) authority is sufficient, and that such authority may be possessed even though it has not been exercised. E.g., *N.L.R.B. v. Leland Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1173. However, in cases where possession of such authority is disputed, lack of exercise thereof is one factor in determining whether or not the authority is indeed possessed.

should be referred to the foreman, such judgments hardly suggest a finding of "supervisory" status. We are troubled by their attendance at bi-weekly "management" meetings but that one factor does not alter the substantial evidence that these men are not supervisors.

Scott presents more difficulty. He is specially trained to perform the critical plating function in the Products Division. During his seven months as an assistant foreman, he once recommended a raise for a fellow worker who soon thereafter received it, and he once prevailed on another employee—by threatened loss of job—not to leave work abruptly in the middle of the day. However, it does not strike us as unusual that the most skilled of three or four men in a shop would command respect from his co-workers and his foreman even though he possessed no "supervisory" powers. Moreover, the quality control work in which he engages concerns the products themselves and only indirectly reflects on his own work and that of the other employees; he is *not* charged with the responsibility of assessing their general capabilities. *Compare N.L.R.B. v. Metropolitan Life Insurance Co., supra* at 1174-1177. As with Morris and Massey, however, his frequent attendance at the "management" meetings lends credibility to the Company's contentions.

However, if "deference to expertise" and "substantial evidence" mean anything in this area of labor law, it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *N.L.R.B. v. Metropolitan Life Insurance Co., supra; compare Illinois State Journal-Register, Inc. v. N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969); *N.L.R.B. v. Little Rock Downtowner, Inc., supra* at 1089; *N.L.R.B. v. Swift and Company, supra* at 563. *Metropolitan Life* presented a much clearer case of "super-

visory" status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence.

Additionally, the Company contends that the Trial Examiner erred in refusing to consider its "new evidence" concerning the status and activities of Scott. We have just recently demonstrated our readiness to require trial examiners to hear such evidence when appropriately presented. *N.L.R.B. v. Maine Sugar Industries, Inc.* F.2d

(1st Cir., May 15, 1970). However, because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he could not have produced it at the appropriate time. The Company's first proffer merely stated that Scott had "admittedly withheld information ... concerning his full responsibilities and authority as an assistant foreman", without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. The Trial Examiner's refusal, therefore, was not error.

Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence and we have no occasion to concern ourselves with Scott's activities on behalf of the Union or with the issue raised in *N.L.R.B. v. Metropolitan Life Insurance Co., supra* at 1178.

II.

Our conclusion above does compel us to confront the issue set forth and discussed in *Pepsi-Cola Buffalo Bottling, supra* at 679-681: whether the National Labor Relations Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor

practice by its admitted refusal to bargain. The Board in our case adhered to its "rule against relitigation", which provides in effect that the Board's denial of review of the Regional Director's findings of fact, after review of a summary of the evidence and the law prepared by the Company, is sufficient. 29 C.F.R. § 102.67(d)(f). The *Pepsi-Cola* decision struck down that part of the rule which allows the Board to find an unfair labor practice without making its own findings, which holding has apparently been embraced by the Fourth Circuit. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969). More recently, however, *Pepsi-Cola* has been distinguished by another panel of the Second Circuit, with Judge Friendly expressing his doubts about the *Pepsi-Cola* decision. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (2d Cir. 1970).² Having previously cited *Pepsi-Cola* in dicta as the existing law on this point—*N.L.R.B. v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969)—we now must decide whether to follow that decision.

Viewing the problem as tabula rasa, there may be some merit to the propositions that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(c) of the Act requires the Board to make its own determinations of fact in unfair labor practices cases, see *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 492 (1951); and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, *Pepsi-Cola Buffalo Bottlers, supra* at 681.

But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C.

² *Pepsi-Cola* has also been distinguished in *State Farm Mutual Auto Ins. Co. v. N.L.R.B.*, 413 F.2d 947 (7th Cir. 1969); see also *N.L.R.B. v. Process Corp.*, 412 F.2d 215, 217-218 (7th Cir. 1969).

§ 153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members "any and all of the powers which it may exercise", and then, as amended, provides that "[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] ... to determine the unit appropriate for the purposes of collective bargaining ... except that the Board may review any action of the Regional Director ..." Taken together, the two provisions reflect a Congressional decision to allow the Board — within the specified limits — to permit its delegates to act in its stead.

The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers,³ it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *E.g., Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination — when not set aside by the Board — is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded.

³ The Board may be called on to make such determinations, either after accepting a Request for Review or after transfer of the case by the Regional Director. See 29 C.F.R. § 102.67.

The legislative history behind the section 3(b) amendment, while not extensive, confirms the breadth of the intended delegation. Senator Goldwater, a member of the Conference Committee which had inserted this amendment which had not appeared in the bills passed by the House and Senate, offered the most complete explanation for the amendment. The purpose was "to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." It was made clear that the regional directors would be "required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act." As one safeguard against possible abuse of the delegated power the Board was assured the right of continuous supervision over its delegates, so that the Board could "refuse to delegate authority to handle all or any part of the proceedings in contested representation cases." 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959) (Remarks of Senator Goldwater).⁴

We draw two conclusions from the amendment and this history. First, the primary purpose behind the amendment was the desire to expedite the final disposition of a part of the Board's caseload. The Board delegated its authority over elections and certifications, and, by its "rule against

⁴ We note also that both Congressman Griffin—co-sponsor of the House bill and an active advocate for the Conference version which eventually became law—and Congressman Barden—Chairman of the House Committee on Education and Labor whose earlier bills, H.R. 4473 and 4474, contained the first mention of the section 3(b) amendment—inserted brief explanations of the section 3(b) amendment about ten days prior to final passage. 2 NLRB Legislative History, 1811(3), 1812(3). Both focused primary attention on the Board's ability to require adherence by its Regional Directors to its rules and precedents. Were the Board additionally expected to make its own findings, there would be no reason for this concern to be voiced at all.

relitigation", decided that all issues finally resolved in such proceedings need not be redetermined in the ensuing unfair labor practice proceeding. Thus, while the Company's interpretation — based on *Pepsi-Cola* — would expedite only elections and certifications but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues, thereby effectuating the Congressional purpose more completely.

Secondly, the section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.

Furthermore, it is important to recognize that Congress did build in a second safeguard against possible abuse by the Regional Directors of the delegated powers. 2 NLRB Legislative History, 1811(3) (Remarks of Congressman Griffin); *ibid.*, 1812(3) (Remarks of Congressman Barden). In both the representation proceeding and the unfair labor practice proceeding, the "ultimate decision" remains with the Board, just as much as in *N.L.R.B. v. Duval Jewerly Co.*, 357 U.S. 1, 8 (1957), where the Court upheld the Board's delegation of some of its authority to an agent because "ultimate decisions on the merits of all the issues coming

before him is left to the Board", although recourse to the Board there, as here, was solely a matter of the Board's discretion.

The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for review, 29 C.F.R. § 102.67(d), and on that basis it concluded that the Company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions.⁵ Of course there is nothing to stop the Board from itself reconsidering the evidence adduced in the representation proceeding which is before it in the unfair labor practice proceeding. See 29 C.F.R. § 102.48(b).

The Fourth Circuit, embracing the *Pepsi-Cola* rule, was most persuaded by the absence of any findings by the Board for the courts of appeals to review. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d at 81-82. However, both Senator Goldwater's remarks and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the

⁵ The adequacy of this procedure is illustrated by the record before us. The Request for Review contained a complete summary of the relevant evidence, with page references to the transcript of the hearing, as well as a fully documented legal memorandum. In effect, the procedure enables the protestant to marshall its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes.

appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C. § 10(d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. We therefore reject the notion that either section 10(c) of the Act or the Administrative Procedure Act, 5 U.S.C. § 557, is offended by the fact that we review the Regional Director's findings which have been adopted by the Board.

The Second Circuit's recent effort — *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190 — to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue "is difficult and requires a fine-drawn balancing of facts and law". We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination.

We therefore part company with both recent decisions of the Second Circuit, and hold that the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness.

The Company's final contention is that it should be relieved of its duty to bargain because of a substantial turnover of its employees since the election. The Company's unfair labor practice, its refusal to bargain, having caused this delay since election, the Board's refusal to set aside the election is sustained. *Cf. N.L.R.B. v. Better Val-U Stores of Mansfield, Inc.*, 401 F.2d 491, 494-495 (2d Cir. 1968).

The petition for enforcement is granted.

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

No. 7462.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

MAGNESIUM CASTING COMPANY,
RESPONDENT.

UNITED STEELWORKERS OF AMERICA,
INTERVENOR.

DECREE

Entered May 21, 1970

This cause came on to be heard upon petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the National Labor Relations Board of April 17, 1969, is hereby affirmed and enforced.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]
[Title Omitted]

RESPONDENT'S MOTION FOR
STAY OF MANDATE

Respondent, Magnesium Casting Company, moves this Court stay operation of its mandate pending Respondent's petition for writ of certiorari which will present to the Supreme Court of the United States the following question:

Did the National Labor Relations Board err in finding that Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) when it refused to bargain with a newly-certified union, where the Board denied Respondent's request for review of the regional director's unit determination on the grounds that the request did not raise issues sufficiently substantial to warrant review and the Board refused to make its own determination or give plenary review to the regional director's determination before entering an unfair labor practice order based on such determination, where Section 10(c) of the Act requires that the Board itself must determine if a party has committed an unfair labor practice?

In *Pepsi-Cola Buffalo Bottling Company v. National Labor Relations Board*, 409 F.2d 676 (1969), the United States Court of Appeals for the Second Circuit answered the above question in the affirmative and the Supreme Court of the United States denied certiorari, 396 U.S. 904. In *NLRB v. Clement-Blythe Companies*, 415 F.2nd 78 (1969), the United States Court of Appeals for the Fourth Circuit agreed with the *Pepsi-Cola* decision. In the immediate case this Court specifically rejected the decisions of these two circuit courts and answered the above question in the negative.

In view of the conflict in the decisions of the circuit courts and the importance of this issue to the merits of this matter, Respondent moves this Court stay its mandate pending application by Respondent to the Supreme Court for writ of certiorari. Counsel for Respondent certifies that this Motion is not for the purpose of delay.

Respectfully submitted,

(s) LOUIS CHANDLER

LOUIS CHANDLER

(s) JEROME H. SOMERS

JEROME H. SOMERS

STONEMAN AND CHANDLER

79 Milk Street

Boston, Massachusetts

Counsel for Respondent

Dated at Boston, Massachusetts

this 28th day of May, 1970

[Certificate of Service Omitted]

[UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT]

[Title Omitted]

ORDER OF COURT

Entered May 29, 1970

Upon motion of respondent,

It is ordered that the decree of this Court of May 21, 1970, be, and the same hereby is, stayed pending the filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States, the same to be filed by July 10, 1970.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[SUPREME COURT OF THE UNITED STATES]

No. 370, OCTOBER TERM, 1970
MAGNESIUM CASTING COMPANY,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD

ORDER ALLOWING CERTIORARI. Filed October 12, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court, U.S.

FILED

JUL 9 1970

E. ROBERT SEAVER, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

VERNON C. STONEMAN
Attorney for Petitioner
79 Milk Street
Boston, Massachusetts

LOUIS CHANDLER

JEROME H. SOMERS

STONEMAN AND CHANDLER

Of Counsel

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Applicable Statutory Provisions	2
Question Presented	2
Statement of the Case	2
Reason for Granting the Writ	5
Conclusion	12
Appendix A	13
Appendix B	26
Appendix C	28
Appendix D	43
Appendix E	47
Appendix F	49

TABLE OF CITATIONS

Cases

<i>NLRB v. Clement-Blythe Companies</i> , 415 F. 2d 78 (C.A. 4, 1969)	5, 6, 10, 11
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 331 U.S. 41 (1947)	8
<i>NLRB v. United Insurance Co.</i> , 390 U.S. 260	8
<i>NLRB v. Olson Bodies, Inc.</i> , 420 F. 2d 1187 (C.A. 2, 1970)	5, 11
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947)	8
<i>Pepsi-Cola Buffalo Bottling Company v. NLRB</i> , 409 F. 2d 676 (C.A. 2, 1969), cert. denied, 396 U.S. 904	4, 5, 6, 7, 9, 11
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941)	11

Table of Contents

	Page
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941)	9
<i>Porter v. Roach</i> , 69 F. Supp. 56 (D. Ore. 1946)	8
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	6
<i>Statutes</i>	
Administrative Procedure Act, 5 U.S.C. Sec. 557(e) ..	10
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.)	
Section 2(3)	3
2(11)	3
3(b)	6, 8, 9, 10
8(a)(5)	2
9	6, 8, 9, 10
9(e)	2
10(e)	5, 6, 9, 11
10(f)	10
28 U.S.C. 1254	2
28 U.S.C. 2112	5
<i>NLRB Rules and Regulations</i>	
Board's Rules and Regulations, Series 8, as amended	
29 C.F.R.	
102.67(e)	3, 7
102.67(d)	3, 7

Table of Contents

iii

Page

Miscellaneous

2 Davis, Administrative Law Sec. 16, 12 (1958)	11
2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1811-1812 (1959)	9
Note, Subdelegation by Federal Administrative Agen- cies, 12 Stanford Law Review 808, 812 (1960)	8

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

MAGNESIUM CASTING COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Magnesium Casting Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinion Below

The Opinion of the Circuit Court is reported at — F.2d —. A copy of this opinion is appended hereto, Appendix A, infra.

Jurisdiction

The judgment was entered on May 21, 1970. The jurisdiction of the Court is invoked under 28 U.S.C.A. Sec. 1254.

Applicable Statutory Provisions

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) (hereinafter called "the Act"), and of the Administrative Procedure Act (5 U.S.C. 557(c)) are set forth in Appendix F. infra.

Question Presented

Did the National Labor Relations Board err in finding that an employer violated Section 8(a)(5) of the Act when it refused to bargain with a newly-certified union, where the Board denied the employer's request for review of the regional director's unit determination in a representation proceeding on the grounds that the request did not raise substantial issues warranting review and the Board refused to make its own determination or give plenary review to the regional director's determination before entering an unfair labor practice order based on such determination, where Section 10(e) of the Act requires that the Board itself must determine if a party has committed an unfair labor practice?

Statement of the Case

Upon petition for certification of collective bargaining representative filed pursuant to Section 9(c) of the Act by the United Steelworkers of America, AFL-CIO, hereinafter called "the Union," a hearing was held on April 4, 8, 12 and 18, 1968, before a hearing officer designated by the

Regional Director for the First Region of the National Labor Relations Board, hereinafter called "the Board." At issue in the hearing was the exclusion of assistant foremen as supervisors, within the meaning of Section 2(11) of the Act.

Among the employees sought by the Employer to be excluded from the unit as assistant foremen was Ivory Scott, who the Employer alleged had illegally and actively participated in soliciting not only support for the Union amongst the employees, but also authorization cards for the Union in support of its efforts to obtain a sufficient showing of interest to support its representation petition.

The Regional Director in his Decision and Direction of Election, issued on May 2, 1968, determined that all but one assistant foreman, that exception *not* being Ivory Scott, were employees within the meaning of Section 2(3) of the Act and were not supervisors (A. 112).¹

Pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.67 (c)(d) (Appendix F, pp. 53-54), the Employer, on May 31, 1968, filed a request for review on the basis that the Regional Director's Decision that the three men, including Ivory Scott, were not supervisors was clearly erroneous on the record and such error prejudicially affected the rights of the Employer (A. 120). The Board denied the request for review, stating it raised "no substantial issues warranting review" (A. 129), thus leaving the Regional Director's Decision as the only determination made on the merits of this crucial issue.

An election was held on June 21, 1968, in which a majority of those in the unit voted for the Union and the results were certified on October 11, 1968 (A. 133).

Again seeking to raise the issue of the assistant fore-

¹ "A" refers to the Appendix filed with the United States Court of Appeals for the First Circuit and certified by the clerk of that court to this Court.

men's exclusions as supervisors, especially in the case of Ivory Scott, the Employer declined to bargain with the Union.

On November 8, 1968, the General Counsel, on behalf of the Board, issued a Complaint against the Employer, alleging the Employer illegally refused to bargain (A. 140). The Employer answered, denying that the appropriate unit should include assistant foremen, alleging that the showing of interest obtained by the Union to support its petition was sufficiently tainted by solicitation on behalf of the Union by the Employer's supervisors so as to warrant dismissal of the petition and revocation of the Certification of Representative (A. 147).

Thereafter, on December 3, 1968, General Counsel without presenting any evidence moved for Summary Judgment. The Employer in its Reply to Show Cause Order, again raised the issue that the Regional Director erred in concluding the assistant foremen were not supervisors (A. 156-158). The Trial Examiner in his Decision issued January 28, 1969 (attached hereto as Appendix C) granted the Motion For Summary Judgment without permitting any opportunity for a hearing. On April 17, 1969, the Board issued its Decision and Order (attached hereto as Appendix B), affirming without comment the rulings, findings, conclusions and recommendations of the Trial Examiner. *At no point in the Trial Examiner's Decision or the Board's Decision and Order was an independent determination made concerning the appropriate bargaining unit.*

The Employer filed a Motion for Reconsideration on April 29, 1969 (attached hereto as Appendix D), on the basis that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether or not the assistant foremen were supervisors within the meaning of the Act was unlawful, citing *Pepsi-Cola Buffalo Bottling Company v. NLRB*, 409 F.2d 676 (C.

A. 2, 1969), cert. denied, 396 U.S. 904. The Board denied the motion "as lacking merit" and stated that with "due deference" to the *Pepsi-Cola* decision, the Board "disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise" (attached hereto as Appendix E). As noted above, this Court denied certiorari in *Pepsi-Cola*.

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit, under the authority of Section 2112 of Title 28 of the United States Code enforced the Board's order. In so doing, the Court specifically disagreed with the Second Circuit's *Pepsi-Cola* decision and the Second Circuit's modification of *Pepsi-Cola* in *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187 (1970), and with the Fourth Circuit's decision agreeing with *Pepsi-Cola*, in *NLRB v. Clement-Blythe Companies*, 415 F.2d 78 (1969).

Reason for Granting the Writ

UNDER SECTION 10(e) OF THE NATIONAL LABOR RELATIONS ACT, THE BOARD IS REQUIRED TO REVIEW THE REGIONAL DIRECTOR'S FINDINGS OF FACT AND DECISION IN A REPRESENTATION PROCEEDING AND MAKE ITS OWN DETERMINATION IN AN UNFAIR LABOR PRACTICE PROCEEDING BEFORE DECIDING WHETHER OR NOT AN UNFAIR LABOR PRACTICE HAS BEEN COMMITTED.

The decision of the Court of Appeals condones a procedure prohibited by the specific language of Section 10(e) of the Act (Appendix F. pp. 49-50) by permitting a regional director's findings of fact and decision to be the basis for an unfair labor practice finding without any Board review of that decision or independent determination of the issues presented in the representation proceeding.

Section 10(e) of the Act specifically provides that the Board itself must determine if a party has committed an

unfair labor practice. See *Universal Camera Corp. v. NL RB*, 340 U.S. 474 (1951). Merely because the issue in a representation proceeding was ruled upon by the regional director did not relieve the Board of its statutory responsibility. Clearly if there had been no representation proceedings and the charges arose strictly out of an unfair labor practice charge, a full hearing on the issue would have been mandatory, with the Trial Examiner hearing the evidence and making his own findings of fact and conclusions of law based on the evidence introduced before him, with the Board, pursuant to Section 10(c), affording full review of such findings and conclusions.

The issue before the Court is whether Section 3(b) of the Act (Appendix F. p. 49), which provides the regional director with authority to rule in representation proceedings *only*, relieves the Board of its duty and responsibility to rule on all issues presented in unfair labor practice proceedings. The Courts of Appeals in the Second and Fourth Circuits in *Pepsi-Cola*, *supra*, and in *Clement-Blythe*, *supra*, respectively, have answered that question in the negative, while the First Circuit in the immediate case has answered in the affirmative. The question of whether or not a party is entitled to Board review in an unfair labor practice proceeding of a regional director's representation decision is of crucial importance to all parties to Board proceedings and the existing conflict results in conflicting Board practices determined according to the Circuit in which the case is pending. Furthermore, the conflict encourages "circuit hunting" in an effort to obtain jurisdiction in that circuit court which is most receptive to the particular party's posture in this matter.

Under Section 3(b) of the Act the Board may delegate to its regional director its powers "under Section 9 to determine the unit appropriate for the purpose of collective bargaining . . ." Discretionary review is permitted by the

Board under 29 C.F.R. 102.67(e) (Appendix F. pp. 53-54) for one or more of the following reasons:

- (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from officially reported Board precedent.
- (2) That the Regional Director's Decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Although the Employer filed a request for review based on (1) and (2) above, it was denied by the Board, which stated it "raised no substantial issues warranting review" (A. 129), thus leaving the Regional Director's Decision as the only determination on the issue. There is no evidence that the Trial Examiner and/or the Board reviewed the record since 29 C.F.R. 102.67 (d) (Appendix F. p. 54) states that the request for review must be a document "enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." In fact, General Counsel for the Board has not even alleged such a review. It is this failure of the Board to perform its functions pursuant to Section 10(e) of the Act which the Employer respectfully submits is unlawful.

In *Pepsi-Cola*, supra, Judge Kaufman, in holding that the Board itself must decide whether an unfair labor practice has been committed, stated:

In an unfair practice proceeding, the Board cannot

completely abdicate its responsibility to a Regional Director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members.⁵ Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked.⁶ See *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 41 (1947); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

⁵ "(A)nother risk is that subordinates will be less competent than agency heads, particularly where the superiors have been selected for their expertise in a certain field. In such a situation private parties have a strong claim to the personal attention of the agency heads." Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 812 (1960). Cf. *Porter v. Roach*, 69 F. Supp. 56 (D. Ore. 1946).

⁶ But the Supreme Court has indicated that a court's deference to the Board is not limited to issues involving the Board's expertise but extends to situations such as this, where the decision rests on the common law of agency, a law which a court might apply as effectively as the Board, *NLRB v. United Insurance Co.*, 390 U.S. at 260.

The expertise of the Board members is the basis for their selection as agency heads. While Section 3(b) of the Act provides for the Regional Director's authority to rule in Section 9 proceedings, which are limited to representation proceedings, nowhere is the Board permitted to delegate its final authority in unfair labor practice proceedings which bear the possibility of findings of unfair practices and court enforceable remedial orders. Where an integral part of those unfair labor practice proceedings involves a representation matter, the litigants are entitled to the personal attention of the Board members and the reflection of their expertise, which Congress considered in approving their appointments. While Congress permitted regional

directors more discretion in representation proceedings, it also maintained the added insurance that the regional directors' decisions would be permitted review by the Board. See 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1811-12 (1959). By failing itself to determine the status of assistant foremen, including Ivory Scott, the Board has acted contrary to the explicit intent and direction of Congress in Section 10(e) of the Act and has deprived the Employer of its specific rights as a litigant under the Act. *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, *supra*.

Although the Board argued in its brief to the First Circuit Court that the representation and unfair labor practice proceedings are "really one and a single trial of the representation issue is enough," relying on *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941), it is clear not only from a reading of the Act, but also from the same case the Board cites that the Board in fact must make a determination of *its own* on the unit issue when it becomes a relevant issue in an unfair labor practice proceeding. Section 3(b) of the Act, which was a post-1941 amendment to the Act, permits the Board to delegate its power under Section 9 to a regional director in a representation matter *only*. The sole purpose of this delegation was to expedite the election process so as to determine matters affecting representation as promptly as possible. At the time of the *Pittsburgh Plate Glass* case, in 1941, the Section 3(b) delegation to the regional director of Section 9 powers did not exist, so no contemplation was made of an occasion when the Board would not rule on a unit issue in an unfair labor practice proceeding. In *Pittsburgh Plate Glass* the Board itself in fact did rule on the unit issue. Clearly the Board would not be required to rule twice on the same evidence on the unit issue. The Board *is* required to rule *at least once* on the unit issue!

The First Circuit Court states that Congress intended to expedite all case handling in representation and unfair labor practice proceedings by the Section 3(b) amendment. If so, why did Congress limit the regional director's authority to the Board's Section 9 representation powers? If the only issue in a refusal to bargain complaint was the unit issue, then the Court would be left with the duty to review only the Regional Director's determination, and not that of the Board, as so empowered in Sections 10(e) and 10(f) of the Act (Appendix F. pp. 50-52).

Furthermore, the procedure used by the Board in this case does not comply with the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. . . .

Nowhere in the record before this Court did the Board state its reasons or basis for making its findings or reaching its conclusions. The Board's only action was to say that the Employer's request for review in the representation proceedings raised "no substantial issues warranting review".

That this method of handling an unfair labor practice proceeding is proscribed was also stated by Circuit Judge Butzner in *NLRB v. Clement-Blythe Companies*, 415 F. 2d 78 (C.A. 4, 1969), at 81:

When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, and the Board is charged with the duty

of stating the reasons why the Board concluded the facts showed a violation of the law, cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941); 2 Davis, Administrative Law Sec. 16.12 (1958). *No statutory exception to this rule exists because critical elements of the controversy were determined preliminarily by the Regional Director in the representation proceedings.* The Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice. 29 U.S.C. Sec. 160(c). (emphasis added)

The Employer in its Motion for Reconsideration requested the Board not necessarily to conduct a de novo hearing, but in the absence of such, to review the record before the Regional Director and make its own decision. See *Clement-Blythe*, supra. The Board did not raise any argument in opposition to the Employer's demand, except to deny the motion "as lacking merit" and to state that with "due deference" to *Pepsi-Cola*, it disagrees with it and adheres to its official decision until the Supreme Court of the United States "rules otherwise" notwithstanding that the Supreme Court denied the Board's writ for certiorari, thus supporting the Employer's position.

In view of the conflict of the First Circuit Court with the Second and Fourth Circuit Courts on the important issues of the scope of a regional director's authority in determining unfair labor practice charges and the degree to which the Board may or may not delegate its authority to decide unfair labor practices to the regional director, this Court must ensure the orderly and proper administration of the Act by resolving these issues.²

² We are informed by Counsel for Olson Bodies, Inc. that on June 9, 1970 they filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review 420 F. 2d 1187, which raises substantially the same issue as stated hereinabove. This Court may wish to consider the immediate case together with that case.

Conclusion

For the reasons set forth above, this Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

VERNON C. STONEMAN
Attorney for Petitioner
79 Milk Street
Boston, Massachusetts

LOUIS CHANDLER

JEROME H. SOMERS

STONEMAN and CHANDLER

Of Counsel

APPENDIX A

**United States Court of Appeals
For the First Circuit**

No. 7462.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

MAGNESIUM CASTING COMPANY,

RESPONDENT,

and

UNITED STEELWORKERS OF AMERICA,

INTERVENOR.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and BOWNES,
District Judge.

Abigail Cooley Baskir, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Marshall F. Berman*, Attorney, were on brief, for petitioner.

Jerome H. Somers, with whom *Louis Chandler* and *Stoneman and Chandler* were on brief, for respondent.

May 21, 1970.

COFFIN, *Circuit Judge*. On the basis of the evidence adduced at a unit determination hearing on March 14, 1968, the Regional Director concluded that six of the seven assistant foremen whose status was in dispute were employees rather than supervisors and thus includable in the proposed bargaining unit at the Magnesium Casting Company plant in Hyde Park, Massachusetts. The Company's

Request for Review, contending that three of the six—Scott, Morris, and Massey—were supervisors, was denied by the Board as raising no substantial issues warranting review. On June 21, the United Steelworkers of America won the election 140 to 59.

Pursuing the accepted method for challenging such unit determinations, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-477 (1964), the Company refused to bargain with the Union. The Company's answer to the ensuing unfair labor practice complaint renewed the contention concerning the status of Scott, Morris, and Massey. In response to the General Counsel's Motion for Summary Judgment, the Company asserted the existence of newly discovered evidence concerning Scott's status and his activities on behalf of the Union. The Trial Examiner granted the Motion for Summary Judgment, concluding that the Company's evidence regarding Scott was not newly discovered and thus that the Regional Director's determination in the representation proceeding should be followed. The Board affirmed the Summary Judgment and adopted the Trial Examiner's conclusion that the Company had committed an unfair labor practice by its refusal to bargain.

Thereafter, the Company filed a Motion for Reconsideration with the Board, contending that the holding in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676 (2d Cir. 1969), *cert. denied*, 396 U.S. 904 (1969), required the Board to make its own findings of fact regarding the status of Scott, Morris, and Massey. Noting its disagreement with the *Pepsi-Cola* rule, the Board denied the Motion, and comes to us seeking enforcement of its order to bargain.

I.

The Company's initial contention is that the inclusion of Scott, Morris, and Massey in the bargaining unit was improper because all three are supervisors within the meaning of the NLRA, 29 U.S.C. § 151 *et seq.* Under section 9

of the Act, only "employees" are properly includable in a bargaining unit, which provision combines with the section 2(3) definition of "employee" to exclude from the bargaining unit "any individual employed as a supervisor". Section 2(11) defines "supervisor" as

"...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[Emphasis added.]

Since the definition is set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer "supervisory" status, e.g., *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1089 (8th Cir. 1969), as long as "such authority is not merely of a routine or clerical nature, but requires the use of independent judgment". See, e.g., *Amalgamated Clothing Workers v. N.L.R.B.*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

Nevertheless, as Judge Woodbury stated in *N.L.R.B. v. Swift and Company*, 292 F.2d 561, 563 (1st Cir. 1961),

"...the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'."

With that in mind, the Regional Director's determination

should be sustained if supported by substantial evidence.

The instant case presents one of those situations where the gradations of authority are particularly difficult to ascertain. The Company has approximately 250 employees in the unit found appropriate, some 22 of whom work in the Products Division. Within that Division there are two sections—one for plating and finishing, another for assembly and packaging—each with 10-12 men under the supervision of a foreman, both of whom are conceded to be “supervisors”. It is within these 10-12 man sections that the present controversy arises. The Company contends that all four assistant foremen are also supervisors; the Regional Director found that only Zagrafos—who worked with 9 employees and had exercised supervisory powers on several occasions—was a supervisor, and that Morris, Massey, and Scott were not.

Morris and Massey are employed in the assembly and packaging section of the Products Division. Working with 2-4 others in separate groups, each performs routine supply and inspection functions in addition to the normal packaging work of the section. Both are paid somewhat more than their fellow workers, but substantially less than their foreman. Neither has ever exercised any of the powers specified in section 2(11).¹ Both refer any important decisions to their foreman, who makes the daily work assignments and checks the work of each of the men in the section, including Morris and Massey, at regular 10 minute intervals throughout the working day. Whatever responsibility these assistant foremen may have vis-a-vis their

¹ We accept the proposition that possession of section 2(11) authority is sufficient, and that such authority may be possessed even though it has not been exercised. E.g., *N.L.R.B. v. Leland Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1173. However, in cases where possession of such authority is disputed, lack of exercise thereof is one factor in determining whether or not the authority is indeed possessed.

fellow workers, it is of a fairly routine nature; while some judgment is obviously required to determine what problems should be referred to the foreman, such judgments hardly suggest a finding of "supervisory" status. We are troubled by their attendance at bi-weekly "management" meetings but that one factor does not alter the substantial evidence that these men are not supervisors.

Scott presents more difficulty. He is specially trained to perform the critical plating function in the Products Division. During his seven months as an assistant foreman, he once recommended a raise for a fellow worker who soon thereafter received it, and he once prevailed on another employee—by threatened loss of job—not to leave work abruptly in the middle of the day. However, it does not strike us as unusual that the most skilled of three or four men in a shop would command respect from his co-workers and his foreman even though he possessed no "supervisory" powers. Moreover, the quality control work in which he engages concerns the products themselves and only indirectly reflects on his own work and that of the other employees; he is *not* charged with the responsibility of assessing their general capabilities. Compare *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1174-1177. As with Morris and Massey, however, his frequent attendance at the "management" meetings lends credibility to the Company's contentions.

However, if "deference to expertise" and "substantial evidence" mean anything in this area of labor law, it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra*; compare *Illinois State Journal-Register, Inc. v. N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969); *N.L.R.B. v. Little Rock Downtowner, Inc.*, *supra*.

at 1089; *N.L.R.B. v. Swift and Company, supra* at 563. *Metropolitan Life* presented a much clearer case of "supervisory" status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence.

Additionally, the Company contends that the Trial Examiner erred in refusing to consider its "new evidence" concerning the status and activities of Scott. We have just recently demonstrated our readiness to require trial examiners to hear such evidence when appropriately presented. *N.L.R.B. v. Maine Sugar Industries, Inc.* F.2d

(1st Cir., May 15, 1970). However, because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he could not have produced it at the appropriate time. The Company's first proffer merely stated that Scott had "admittedly withheld information . . . concerning his full responsibilities and authority as an assistant foreman", without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. The Trial Examiner's refusal, therefore, was not error.

Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence and we have no occasion to concern ourselves with Scott's activities on behalf of the Union or with the issue raised in *N.L.R.B. v. Metropolitan Life Insurance Co., supra* at 1178.

II.

Our conclusion above does compel us to confront the issue set forth and discussed in *Pepsi-Cola Buffa'o Bottling, supra* at 679-681: whether the National Labor Relations

Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor practice by its admitted refusal to bargain. The Board in our case adhered to its "rule against relitigation", which provides in effect that the Board's denial of review of the Regional Director's findings of fact, after review of a summary of the evidence and the law prepared by the Company, is sufficient. 29 C.F.R. § 102.67(d)(f). The *Pepsi-Cola* decision struck down that part of the rule which allows the Board to find an unfair labor practice without making its own findings, which holding has apparently been embraced by the Fourth Circuit. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969). More recently, however, *Pepsi-Cola* has been distinguished by another panel of the Second Circuit, with Judge Friendly expressing his doubts about the *Pepsi-Cola* decision. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (2d Cir. 1970).² Having previously cited *Pepsi-Cola* in dicta as the existing law on this point—*N.L.R.B. v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969)—we now must decide whether to follow that decision.

Viewing the problem as tabula rasa, there may be some merit to the propositions that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(e) of the Act requires the Board to make its own determinations of fact in unfair labor practice cases, see *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 492 (1951); and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, *Pepsi-Cola Buffalo Bottlers, supra* at 681.

² *Pepsi-Cola* has also been distinguished in *State Farm Mutual Auto Ins. Co. v. N.L.R.B.*, 413 F.2d 947 (7th Cir. 1969); see also *N.L.R.B. v. Process Corp.*, 412 F.2d 215, 217-218 (7th Cir. 1969).

But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C. § 153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members "any and all of the powers which it may exercise", and then, as amended, provides that "[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] . . . to determine the unit appropriate for the purposes of collective bargaining . . . except that the Board may review any action of the Regional Director . . ." Taken together, the two provisions reflect a Congressional decision to allow the Board—within the specified limits—to permit its delegates to act in its stead.

The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers,³ it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *E.g., Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination—when not set aside by the Board—is entitled to the same

³ The Board may be called on to make such determinations, either after accepting a Request for Review or after transfer of the case by the Regional Director. See 29 C.F.R. § 102.67.

weight in the subsequent proceeding that the Board's own determination would have been accorded.

The legislative history behind the section 3(b) amendment, while not extensive, confirms the breadth of the intended delegation. Senator Goldwater, a member of the Conference Committee which had inserted this amendment which had not appeared in the bills passed by the House and Senate, offered the most complete explanation for the amendment. The purpose was "to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." It was made clear that the regional directors would be "required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act." As one safeguard against possible abuse of the delegated power, the Board was assured the right of continuous supervision over its delegates, so that the Board could "refuse to delegate authority to handle all or any part of the proceedings in contested representation cases." 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959) (Remarks of Senator Goldwater).⁴

We draw two conclusions from the amendment and this history. First, the primary purpose behind the amendment was the desire to expedite the final disposition of a part of the Board's caseload. The Board delegated its authority

⁴ We note also that both Congressman Griffin—co-sponsor of the House bill and an active advocate for the Conference version which eventually became law—and Congressman Barden—Chairman of the House Committee on Education and Labor whose earlier bills, H.R. 4473 and 4474, contained the first mention of the section 3(b) amendment—inserted brief explanations of the section 3(b) amendment about ten days prior to final passage. 2 NLRB Legislative History, 1811(3), 1812(3). Both focused primary attention on the Board's ability to require adherence by its Regional Directors to its rules and precedents. Were the Board additionally expected to make its own findings, there would be no reason for this concern to be voiced at all.

over elections and certifications, and, by its "rule against relitigation", decided that all issues finally resolved in such proceedings need not be redetermined in the ensuing unfair labor practice proceeding. Thus, while the Company's interpretation—based on *Pepsi-Cola*—would expedite only elections and certifications but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues, thereby effectuating the Congressional purpose more completely.

Secondly, the section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.

Furthermore, it is important to recognize that Congress did build in a second safeguard against possible abuse by the Regional Directors of the delegated powers. 2 NLRB Legislative History, 1811(3) (Remarks of Congressman Griffin); *ibid.*, 1812(3) (Remarks of Congressman Barden). In both the representation proceeding and the unfair labor practice proceeding, the "ultimate decision" remains with the Board, just as much as in *N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1, 8 (1957), where the Court upheld the Board's delegation of some of its authority to an agent because "ultimate decisions on the merits of all the issues coming before him is left to the Board", although recourse to the

Board there, as here, was solely a matter of the Board's discretion.

The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for Review, 29 C.F.R. § 102.67(d), and on that basis it concluded that the Company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions.⁵ Of course there is nothing to stop the Board from itself reconsidering the evidence adduced in the representation proceeding which is before it in the unfair labor practice proceeding. See 29 C.F.R. § 102.48(b).

The Fourth Circuit, embracing the *Pepsi-Cola* rule, was most persuaded by the absence of any findings by the Board for the courts of appeals to review. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d at 81-82. However, both Senator Goldwater's remarks and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C.

⁵ The adequacy of this procedure is illustrated by the record before us. The Request for Review contained a complete summary of the relevant evidence, with page references to the transcript of the hearing, as well as a fully documented legal memorandum. In effect, the procedure enables the protestant to marshal its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes.

§ 10(d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. We therefore reject the notion that either section 10(c) of the Act or the Administrative Procedure Act, 5 U.S.C. § 557, is offended by the fact that we review the Regional Director's findings which have been adopted by the Board.

The Second Circuit's recent effort—*N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190—to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue "is difficult and requires a fine-drawn balancing of facts and law". We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination.

We therefore part company with both recent decisions of the Second Circuit, and hold that the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness.

The Company's final contention is that it should be

relieved of its duty to bargain because of a substantial turnover of its employees since the election. The Company's unfair labor practice, its refusal to bargain, having caused this delay since election, the Board's refusal to set aside the election is sustained. *Cf. N.L.R.B. v. Better Val-U Stores of Mansfield, Inc.*, 401 F.2d 491, 494-495 (2d Cir. 1968).

The petition for enforcement is granted.

APPENDIX B**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD****DECISION AND ORDER**

On January 28, 1969, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and Respondent filed a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations¹ of the Trial Examiner.

¹ In its exceptions to the Trial Examiner's Decision, the Charging Party requests an affirmative bargaining order, without any further request that the Respondent bargain with it, and a monetary remedy to, *inter alia*, make the employees and it whole for losses they may have suffered as a result of the Respondent's unlawful refusal to bargain. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5), and therefore deny the said request. See *Monroe Auto Equipment Company*, 164 NLRB No. 144, footnote 1.

ORDER

Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Magnesium Casting Company, Hyde Park, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. April 17, 1969.

FRANK W. McCULLOCH, Chairman
JOHN H. FANNING, Member
SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

**UNITED STATES OF AMERICA
 BEFORE THE
 NATIONAL LABOR RELATIONS BOARD
 DIVISION OF TRIAL EXAMINERS
 WASHINGTON, D.C.**

Case No. 1-CA-6498

MAGNESIUM CASTING Co.

and

UNITED STEELWORKERS OF AMERICA,
 AFL-CIO

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding¹

Upon a petition filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159(c)) by United States Steelworkers of America, AFL-CIO, hereinafter called the Charging Party, a hearing was held by the Regional Director for Region 1 of the Board at which the employer appeared specially arguing that the hearing should not be conducted because of the pendency of a charge filed by it against the Union alleging a violation of Section 8(b) (1) (A). The Motion was denied and the hearing was completed.

The Regional Director consequently issued a decision directing an election in a unit consisting of all production and maintenance employees of the employer at its Hyde Park, Massachusetts plant including the records keeping

¹ Administrative or official notice is taken of the record in the representation proceeding Case No. 1-RC19973, as the term "record" is defined in Section 102.68 and 102.69 (f) of the Board's Rules and Regulations Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB No. 81 enfd. 388 F. 2d 683 (C.A. 4, 1968).

department employees, shipping and receiving employees and the truckdriver but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. The Decision specifically dealt with a classification of alleged supervisors known as assistant foremen, six of whom were found to be employees and the seventh to be a supervisor and excluded from the unit.

On May 31, 1968, the Respondent filed a request for review pursuant to Section 102.67 of the Board's Rules and Regulations contending that three of the assistant foremen found to be employees are in fact supervisors and the Union filed its statement in opposition to the request for review. On June 18 the Board denied the request for review on the ground that it raised no substantial issues warranting review. On June 17 Respondent filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition contending that by furnishing an election eligibility list to the Union pursuant to the *Excelsior* rule.² Respondent had been required to lend assistance to the Union which necessarily would affect the results of the election. Respondent also contended that the rule was improperly promulgated and contrary to the requirements of the Administrative Procedures Act.

The Motion was denied on June 19 by the Regional Director on the ground that the *Wyman-Gordon*³ decision of the First Circuit upon which Respondent rested its Motion does not provide for retroactive application. The election was conducted on June 21, 1968, and Respondents moved the District Court for the District of Massachusetts for a ruling enjoining the certification of the results of the election on the same grounds on which its motion to the Regional Director rested. The United States District Court

² *Excelsior Underwear, Inc.*, 156 NLRB 1236.

³ *Wyman-Gordon Company et al. v. N.L.R.B.*, 379 F. 2d 394 (1968).

granted the rule sought by Respondent and its action was summarily reversed by the United States Court of Appeals for the First Circuit.⁴

On June 28 the Respondent filed objections to conduct affecting the results of the election, again raising the "Ex-celsior" and the "Wyman-Gordon" issues and further alleging that prior to the election the Union informed employees that if they did not sign an authorization card they would have to pay \$75 initiation fee to the Union. The objections were overruled and the United Steelworkers of America was certified as the representative of the employees on October 11, 1968. Respondent by telegram to the Board excepted to the Supplemental Decision and Certification on the ground that the employer proposed to seek a writ of certiorari before the United States Supreme Court to the decision of the First Circuit Court of Appeals in which the District Court injunction was set aside. This exception was treated as a request for review and denied on the ground that it raised no substantial issues warranting review.

The Complaint Case

On October 22, 1968, the Union filed the unfair labor practice charge involved in the instant case, alleging that the employer refused to bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in spite of the certification. On November 8, 1968, the Regional Director for Region 1 issued a Complaint and Notice of Hearing alleging that Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request. On November 18 Respondent filed a Motion for a Bill of Particulars and on the 19th an Answer to the Complaint. The General Counsel filed an Opposition to the Motion for a Bill of Par-

⁴ 69 LRRM 2235.

ticulars giving certain additional particulars. On December 5 a Motion for Summary Judgment dated December 3 was filed with the Chief Trial Examiner by the Regional Director. Trial Examiner Schneider on December 6 issued an Order to Show Cause on the Motion for Summary Judgment to which Respondent replied on January 2, 1969.

Ruling on Motion for Summary Judgment

In its Opposition to the Motion for Summary Judgment the Respondent urges that the General Counsel's Motion should be denied for a number of reasons which may be summarized as follows:

1. The General Counsel omitted part of the background of the case notably the grounds on which the Regional Director denied the employer's Motion to Withdraw Decision and Direction of Election and Dismiss the Petition.
2. The complaint is premature since the Respondent has filed a Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit in its injunction proceeding and further the Supreme Court has agreed to review the *Wyman-Gordon* Decision wherefore the Board should not proceed with this matter until both actions by the Supreme Court have been consummated.
3. The General Counsel should be estopped from its motion by the action of the General Counsel in granting certain assurances to Respondent that it is entitled to a full hearing.
4. The Decision of the First Circuit Court of Appeals in *Wyman-Gordon* constitutes newly-discovered evidence.
5. The representation election was not conducted according to rules promulgated in accordance with *Section 6* of the Act and is therefore invalid.
6. The appropriate unit should have included as supervisors the assistant foremen.

7. Newly-discovered evidence concerning the supervisory status of one Scott and his actions on behalf of the Union necessitate a full hearing.

Finally Respondent moved that the Trial Examiner postpone the hearing in the instant case until the Supreme Court acts on the petition for writ of certiorari and also renders its decision in the *Wyman-Gordon* case.

With respect to the first issue raised by Respondent concerning the omission of facts by the General Counsel, as I stated above, administrative notice has been taken of the record in the representation proceeding which includes the employer's Motion to Withdraw the Decision and Direction of Election, the denial by the Regional Director, the Request for Review and the Board's denial thereof. Accordingly, the facts allegedly omitted by the General Counsel are before the Trial Examiner and the Board.

With regard to Respondent's argument that the complaint issued by the General Counsel is premature, to the extent that Respondent's argument is predicated on the litigation of the validity of the *Excelsior* rule in the *Wyman-Gordon* case this matter has already been considered by the Board in the representation proceeding and will not be reconsidered herein. To the extent that the argument is predicated on the filing of a petition for certiorari in the injunction proceeding Respondent cites no authority for the proposition that the Board's processes should be held up pending a determination by the Supreme Court of the United States whether to grant certiorari and presumably if certiorari is granted the period of time necessary for the Supreme Court to issue its decision. As the United States Court of Appeals for the First Circuit stated in its decision in Magnesium Casting Co., F.2d (September 10, 1968) "labor matters should proceed promptly." I am not convinced by Respondent's argument especially in view of the fact that Respondent's petition for a writ of certiorari

does not necessarily speak to the validity of the election.

Regarding Respondent's argument that the General Counsel should be estopped by alleged assurances by General Counsel Ordman that Respondent is entitled to a full and complete hearing, the alleged assurances are contained in a letter which recites the provisions of Section 10(b) of the National Labor Relations Act that any person charged with the commission of an unfair labor practice must be served with a complaint stating the charges and a notice of hearing. The notice of hearing sets the time and place of the hearing and advises a Respondent that it is entitled to participate fully and present whatever evidence it has in support of its position to a duly designated trial examiner.

The General Counsel's letter goes on to state "the Act also provides that such proceedings 'shall so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States....'" The Board and the courts have many times had occasion to consider whether the language quoted above constitutes a requirement that a hearing be conducted in cases such as this. A recent case in which this issue was raised is *El-Ge Potato Chip Company, Inc.*, 173 NLRB No. 19 in which the Trial Examiner quoted from the Board decision in *Harry T. Campbell Sons' Corporation*, 164 NLRB No. 36 fn. 9 "where there are no unresolved issues requiring an evidential hearing the motion of the General Counsel for summary judgment on the pleadings is normally granted. There is no absolute right to a hearing." The United States Court of Appeals for the Fifth Circuit put it succinctly in *NLRB v. Air Control Window Products of St. Petersburg*, 335 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality."

The letter of the General Counsel does not constitute a waiver but on the contrary it refers to language which the Board and the courts have so many times construed that the construction must be read together with language. I reject the argument.

Respondent contends that the decision of the court in the *Wyman-Gordon* case and the "imminent decision of the United States Supreme Court in the same case" constitutes newly discovered evidence. Respondent does not indicate in what regard it considers that the decisions of courts constitute evidence nor, other than asserting the fact, do they argue so. However whether viewed as evidence or legal authority the contention was raised before the Board in the representation proceeding and rejected. The same must be said of Respondent's contention that the representation election was not conducted according to rules promulgated in accordance with Section 6 of the Act and is invalid. Respondent's reference therein is to the fact that the *Wyman-Gordon* decision found the "*Excelsior*" rule invalid because it was not published as a rule but laid down in a decision. Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.⁵ Respondent does not assert that any special circumstances exist other than its characterization of the decisional authorities in the *Wyman-Gordon* case as evidence and a contention that there is newly discovered evidence concerning

⁵ *Howard Johnson Company*, 164 NLRB No. 121; *Winfield Manufacturing Co., Inc.*, 173 NLRB No. 103; *El-Ge Potato Chip Company, Inc.*, *supra*, and all the cases therein cited on this point.

the supervisory status of Ivory Scott, one of the assistant foremen.

In its Reply Respondent submits that Ivory Scott "admittedly withheld information in the representation hearing concerning his full responsibilities and authority as an assistant foreman for Respondent and that Scott solicited authorization cards for the Union and participated in its organizational drive." The only construction that I can make of Respondent's Reply is that it views Scott's "admission" as newly discovered evidence, however Respondent furnishes no support for its contention other than offering to prove in a full hearing that Scott had supervisory authority and did various acts consistent thereto, each of which particulars was litigated and considered in the hearing in the representation case. To what extent such evidence is new is impossible to determine other than Scott's admission which presumably came after the hearing and of which we know nothing. The evidence which Respondent offers to adduce is evidence which Respondent must have had prior to the representation case hearing. With regard to the fact that Scott solicited authorization cards and participated in the Union's organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact. New evidence on an irrelevant issue is certainly not grounds for a hearing. The issue as to the inclusion of the assistant supervisors was vigorously contested at the representation hearing. No reason is given for failure to offer evidence such as Respondent recites at that time, if in fact it was not offered. There is no showing that the testimony was not then available or that it could not have been obtained and adduced with the exercise of reasonable diligence. Under these circumstances reopening the representation hearing at this stage of the

⁶ *Goldspot Dairy, Inc.*, 173 NLRB No. 151 Cf., *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C.A. 10, 1964) therein cited.

proceeding is not warranted.⁶ I find the Respondent's contention unsubstantiated.

Finally Respondent moves to postpone the hearing until the decision of the Supreme Court on its petition for writ of certiorari. Inasmuch as I have found that no hearing is necessitated herein the Motion must be denied.

There being no unresolved issues requiring an evidential hearing the Motion of the General Counsel for summary Judgment is granted and I hereby make the following:

Findings and Conclusions

I. JURISDICTION AND LABOR ORGANIZATION

It is admitted in the answer and therefore found (1) that the Respondent is engaged in commerce within the meaning of 2(6) and (7) of the Act and (2) that the Union is a labor organization within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The Unit

The following employees at the Respondent's Hyde Park, Massachusetts plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

2. The Certification

On June 21, 1968, the majority of the employees in the unit described above by a secret ballot election conducted under the supervision of the Regional Director for the First Region of the Board designated the Union as the

representative for the purpose of collective bargaining with Respondent, and on October 11, 1968, the Regional Director for the First Region certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. The Request to Bargain and the Respondent's Refusal

On or about October 22, 1968, the Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of Respondent in the unit described above.⁷

At all times since on or about October 22, 1968, the Respondent has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly I find that Respondent has refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit and that by such refusal the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

**III. THE EFFECT OF THE UNFAIR PRACTICES
UPON COMMERCE**

The acts of the Respondent as set forth in Section II above occurring in connection with its operations as found in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in un-

⁷ Although Respondent in its answer denied that the Union requested Respondent to bargain it has at no point in the proceeding controverted this fact and its answer and particularly its Reply to the Order to Show Cause make it ultimately clear that it has and continues to refuse to bargain.

fair labor practices within the meaning of Section 8(a)(5) and (1) of the Act I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and if an understanding is reached embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their collective-bargaining agent for the period provided by law I shall recommend that the initial year of certification be construed as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Pacific Intermountain Express Company*, 173 NLRB No. 75; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 enfd. 328 F. 2d 600 (C.A. 5) cert. denied 379 U.S. 817.

Conclusions of Law

1. Magnesium Casting Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees of Magnesium Casting Co. employed at its Hyde Park, Massachusetts plant including the record keeping department employees, shipping and receiving employees, and the truck-driver exclusive of its office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since October 22, 1968, the above-named labor organization has been certified as the exclusive representative of all the employees in the aforesaid appropriate unit for

the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 22 and at all times since to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain Respondent has interfered with, restrained, and coerced and is interfering with, restraining and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Magnesium Casting Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours and other terms and conditions of employment with United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate units.

All production and maintenance employees employed at Respondent's Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its Hyde Park, Massachusetts place of business copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representatives shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify said Regional Director for Region 1 in writing within 20 days from receipt of this Recommended Order what steps the Respondent has taken to comply therewith.⁹

Dated at Washington, D.C. January 28, 1969

(s) PAUL E. WEIL,
Trial Examiner

⁸ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

⁹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon request bargain with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees employed at our Hyde Park, Massachusetts plant including the records keeping department employees, shipping and receiving employees and the truckdriver exclusive of office clerical employees, professional employees,

guards and all supervisors as defined in Section 2(11) of the Act.

MAGNESIUM CASTING CO.

(Employer)

Dated

By

(Representative)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, John F. Kennedy Federal Bldg., 20th Floor, Cambridge & New Sudbury Streets, Boston, Mass. 02203 (Tel. No. 617-223-3300).

APPENDIX D**MOTION FOR RECONSIDERATION**

Comes now Magnesium Casting Co., Respondent in the above-entitled matter, and pursuant to Section 102.48(d) of the Board's Rules and Regulations moves the Board reconsider its Decision and Order, dated April 17, 1969, for the reason that the Board denied, on June 18, 1968, the Employer's Request for Review, dated May 31, 1968, subsequent to the representation hearing on the ground that it raised "no substantial issues warranting review" (see Ex. B and C. attached to Motion for Summary Judgment) and later granted General Counsel's Motion for Summary Judgment in the above-entitled case, such conduct by the Board being in violation of Section 29 U.S.C. Sec. 160(e), wherein Congress stated that the Board must rule whether a litigant has committed an unfair labor practice. Respondent urges that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether the Regional Director's decision was right violates the Act, as held in *Pepsi-Cola Buffalo Btlg. Co. v. NLRB*, (USCA 2, 1967) 70 LRRM 3185, a case decided on March 25, 1969, following submission of Brief in the immediate case.

Crucial to the merits of the unfair labor practice case is the determination of the supervisory capacity of employee Ivory Scott, called an assistant foreman, who actively solicited authorization cards, as an agent for the union, and submitted these cards to support the union's showing of interest in its petition for a representation election, the results of which form the basis for the union's claim to be the employees' duly chosen exclusive collective bargaining agent. Furthermore, Scott actively campaigned and solicited votes for the union as an agent of the union, behavior which violates Section 8(b)(1)(A)

of the Act. The total behavior of Scott, Respondent asserts, required the Regional Director to dismiss the petition since the showing of interest was tainted and the activity of Scott constituted an unfair labor practice, as alleged by Respondent in its charge in Case No. 1-CB-1362.

Following the filing by the union of a petition for representation, a hearing was held at which time the supervisory authority of a number of employees, including Ivory Scott, was contested. Simultaneously a charge filed by Respondent was pending in Case No. 1-CB-1362, alleging the union violated 8(b)(1)(A) by having Scott act as its agent in soliciting authorization cards, used to support the union's petition, and engaging in other conduct in support of the union tending to restrain and coerce employees in the exercise of their Section 7 rights. On the basis of the evidence adduced at the hearing, the Regional Director concluded that Scott, among others, was not a supervisor and directed an election.

The Request for Review filed by the Respondent was denied on the ground that it raised "no substantial issues warranting review." Following an election in which the union received a majority, Respondent refused to bargain and raised as part of its defense the supervisory authority of Ivory Scott and the acts of Scott as agent for the union. The General Counsel moved for summary judgment, which was granted by the Trial Examiner, who refused to review the Regional Director's Decision, stating (Trial Examiner's Decision p. 5, 1. 17-23):

Equally the contention that the appropriate unit should have excluded the assistant foremen was litigated before the Board in the representation proceeding. In the absence of newly discovered or previously unavailable evidence or special circumstances it is established Board policy not to permit litiga-

tion before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior representation proceeding.

That the Trial Examiner relied on the findings on the Regional Director is clear (Trial Examiner's Decision p. 5, 1. 42-44):

With regard to the fact that Scott solicited authorization cards and participated in the union organizational drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact.

The Trial Examiner's statement that the Board found Scott to be a supervisor is clearly erroneous, since the Board did *not* decide the issue, but in fact merely refused to review the record and to make its own decision. The Trial Examiner and the Board also refused to review the record independently of the Regional Director's conclusions on this issue, as is evident from the failure of both to discuss the merits of the issue of Scott's supervisory authority.

Respondent urges that the standards for review in Section 102.67 (c) of the Board's Rules and Regulations run contrary to the intent of Congress since they prevent Respondent from having the Board, as Congress specifically designated, make the final decision in unfair labor practice cases. The tests for the granting of review are narrow and confining and in most cases where a question of law or policy is not an issue, review will be granted solely on a finding by the Board, based on the Request for Review which must be a "self-contained" document enabling the Board to rule without the necessity of recourse to the record (Section 102.67(d)), that the Regional Director's decision was "clearly erroneous" and there are "compelling reasons" for review. By seeking to avoid "relitigation" of matters, the Board is shirking its responsibility to decide unfair labor practice. See 29 U.S.C.

Sec. 160 (c); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Circuit Judge Kaufman, writing the Opinion in *Pepsi-Cola Buffalo Btlg. Co. v. NLRB*, *supra*, stated at 3187

In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 20 LRRM 2115 (1947); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 19 LRRM 2397 (1947).

On the basis of the above discussion, Respondent requests the Board to review the Decision of the Regional Director and to make its own decision as to whether the Regional Director's determination was correct. Respondent also reserves the defenses raised in its original Exceptions and Brief in Support of Exceptions, despite the limited nature of this Motion for Reconsideration.

Respectfully submitted,
MAGNESIUM CASTING COMPANY
By its attorneys
STONEMAN AND CHANDLER
(s) LOUIS CHANDLER
(s) JEROME H. SOMERS

Dated at Boston, Massachusetts

April 29, 1969

Post Office Address:

79 Milk Street

Boston, Massachusetts 02109

(CERTIFICATE OF SERVICE)

APPENDIX E

ORDER DENYING MOTION

On January 28, 1969, Trial Examiner Paul E. Weil of the National Labor Relations Board issued his Decision in the above-entitled proceeding. The Trial Examiner took administrative notice of the record in a related representation proceeding, Case 1-RC-9973, in which the Regional Director, in his Decision and Direction of Election, had found, *inter alia*, that Ivory Scott was not a supervisor; the Board had denied review of the Regional Director's finding and the Regional Director had certified the Union. After consideration of the record in the instant case, the Trial Examiner concluded that there were no unresolved issues requiring an evidential hearing. He, therefore, granted the General Counsel's Motion for Summary Judgment, found that the Respondent had refused to bargain with the certified Union in violation of Section 8(a)(5) and (1) of the Act, and recommended that it cease and desist therefrom and bargain with the Union. The Board, on April 17, 1969, issued a Decision and Order¹ in which it adopted the Trial Examiner's findings, conclusions and recommendations as contained in his Decision, and ordered that the Respondent take the action set forth in the Trial Examiner's Recommended Order.

Thereafter, on May 1, 1969, the Respondent filed a motion for reconsideration of the Board's Decision and Order, contending that the Board's failure to review the record before the Regional Director in Case 1-RC-9973 for the purpose of making its own decision that Ivory Scott was not a supervisor is in violation of the National Labor Relations Act, as held by the United States Court of Appeals for the Second Circuit in *Pepsi-Cola Buffalo Bottling*

¹ 175 NLRB No. 68.

Co. v. N.L.R.B., — F. 2d —, (March 25, 1969), petition for rehearing denied May 15, 1969. The Respondent requests that the Board independently review the Regional Director's decision and determine whether or not the Regional Director's decision that Ivory Scott was not a supervisor was correct.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion for reconsideration be, and it hereby is, denied as lacking merit.²

Dated, Washington, D. C., August 11, 1969.

By direction of the Board:

(s) GEORGE A. LEET

Associate Executive Secretary

² With due deference to the Second Circuit's decision in *Pepsi-Cola Buffalo Bottling Company v. N.L.R.B.*, *supra*, the Board disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise.

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq.) are as follows:

Sec. 3 (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . .

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 10 (e) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear

argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . .

See. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Sec. 10 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provision of the Board's Rules and Regulations is 29 C.F.R. § 102.67. It provides in part:

Sec. 102.67 Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.—(a) The regional director may proceed, either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies thereof shall be served simultaneously on all other parties to the proceeding. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be received not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record

shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling

made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

* * *

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

The relevant provisions of the Administrative Procedure Act is 5 U.S.C. 557(c), which provides in part:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. . . .

In the Supreme Court of the United States
OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD

The question presented is whether the National Labor Relations Board is required to give plenary review to a regional director's determination of the unit appropriate for purposes of representation under the National Labor Relations Act before entering an unfair labor practice order based on that determination. Section 3(b) of the Act specifically permits the Board to delegate its authority to make such determinations to its regional directors, and provides only for discretionary Board review, which was denied in

this case. The First Circuit's negative answer to this question, as the petition correctly states, conflicts with the decision of the Second Circuit in *Pepsi-Cola Buffalo Bottling Co. v. National Labor Relations Board*, 409 F. 2d 676, in which the Board's petition for certiorari was denied, 396 U.S. 904.¹

In *National Labor Relations Board v. Olson Bodies, Inc.*, 420 F. 2d 1187 (C.A. 2), however, petition for a writ of certiorari pending, No. 238, 1970 Term, a different panel of the Second Circuit² stated that it did not regard *Pepsi-Cola* "as making remand automatic whenever the Board has declined to review a decision of a regional director under powers delegated to him pursuant to § 3(b)," but as applying only to an issue which "'is difficult and requires a fine-drawn balancing of facts and law'" (*id.*, at 1190).³ Despite the Second Circuit's apparent narrowing of its *Pepsi-Cola* decision, the Board still be-

¹ The Fourth Circuit's apparent approval of *Pepsi-Cola*, in *National Labor Relations Board v. Clement-Blythe Cos.*, 415 F. 2d 78, 82, is dictum, for the court, in remanding the latter case to the Board, stated (*id.*, at 81, n. 6): "We do not reach the question of whether the Board could discharge its duty by adopting the reasons supplied by the Regional Director. In this case the Regional Director gave no reasons."

² The panel consisted of Judges Friendly, Smith, and Feinberg. Only Judge Smith was on the *Pepsi-Cola* panel.

³ Moreover, Judge Friendly, who wrote the opinion in *Olson*, stated that he was "inclined to doubt whether *Pepsi-Cola* gave adequate recognition to the 1959 amendment of § 3(b) of the National Labor Relations Act empowering the Board to delegate various powers to a regional director, and the pertinent legislative history * * *." 420 F. 2d at 1190.

lieves, for the reasons given in its petition for certiorari in *Pepsi-Cola*, No. 469, 1969 Term, that the issue is of importance in the administration of the Act, that it will continue to be the subject of litigation,⁴ and that a definitive ruling by this Court is appropriate.

For these reasons, the Board does not oppose the present petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JULY 1970.

⁴ The First Circuit has concluded that the Second Circuit's effort to confine *Pepsi-Cola* to "difficult" issues is "an unsatisfactory compromise," which would be difficult to apply and "would frustrate rather than foster the expeditious disposition of cases intended by Congress" (Pet. in No. 370, p. 24).

In the Supreme Court of the United States
OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

***ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT***

**SUPPLEMENTAL MEMORANDUM FOR THE
NATIONAL LABOR RELATIONS BOARD**

This memorandum is submitted to bring to this Court's attention the opinion of the United States Court of Appeals for the Tenth Circuit in *Meyer Dairy, Inc. v. National Labor Relations Board*, decided on August 18, 1970. A copy of the opinion is appended, *infra*, pp. 3-13. In the discussion relevant here, *infra*, pp. 7-9, the court called attention to the conflict between the decision of the First Circuit in this case and the decision of the Second Circuit in the *Pepsi-Cola* case regarding the Board's obligation to

review a regional director's determination of the unit appropriate for purposes of representation under the National Labor Relations Act before entering an unfair labor practice order based thereon. The court adopted the First Circuit's view, that plenary review is not required.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1970.

APPENDIX**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
JULY TERM—1970**

[Filed United States Court of Appeals Tenth Circuit
Aug. 18, 1970 William L. Whittaker, Clerk]

No. 531-69

**MEYER DAIRY, INC., A Subsidiary of MILGRAM FOOD
STORES, INC., PETITIONER,**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

**PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

Charles W. Medley, Kansas City, Missouri, for Petitioner.

Joseph C. Thackery, National Labor Relations Board (Arnold Ordman, Dominick L. Manoli, Marcel Mallet-Prevost and Frank H. Itkin, National Labor Relations Board, with him on the brief), for Respondent.

Before PICKETT, HILL and HICKEY, Circuit Judges**PICKETT, Circuit Judge**

Meyer Dairy Distributors Association, a group of milk distributors, petitioned the National Labor Relations Board, in accordance with the provisions of Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c), for certification as an appropriate unit for collective bargaining with its alleged employer, Meyer Dairy Company. The Company resisted the petition primarily on the basis that the members of the Association were independent contractors as defined in the National Labor Relations Act, Section 2(3) (29 U.S.C. § 152(3)). A hearing was had before a hearing officer. Thereafter the Regional Director, upon consideration of the entire record, affirmed the rulings of the hearing officer and found the members of the Association to be employees who, together with the Company retail route drivers, all working out of the Basehor, Kansas facility of Meyer, constituted an appropriate collective bargaining unit. He thereupon ordered an election. The Board summarily denied Meyer's request for a review of the Regional Director's decision, stating that it raised "no substantial issues warranting review." Following an election, the Association was certified as the exclusive representative for purposes of collective bargaining.

Meyer, still contending that the distributors were not employees, refused to bargain, whereupon unfair labor practice charges were filed. Meyer answered the complaint, admitting refusal to bargain, again alleging that the evidence was insufficient to support the findings of the Regional Director that the Association members were employees of the Company. Concluding that this issue had been previously litigated

before the Regional Director, the Board granted a motion for summary judgment.¹ In the accompanying decision and order the Board concluded that Meyer, in its refusal to bargain with the Association, was guilty of unfair labor practices within the meaning of Section 8(a)(5) and (1). The conventional cease and desist order was entered. Meyer has petitioned for a review of the Board's order and the Board has requested an enforcement order.

The Company raises two issues. First, the contention is made that the Board's order should not be enforced because it improperly utilized summary judgment procedures. Secondly, Meyer contends that the evidence before the hearing officer conclusively established that the distributors were "independent contractors" within the meaning of 29 U.S.C. § 152(3). On the first question, the essence of the Meyer position is that under the provisions of Section 10(a) and (b) of the National Labor Relations Act (29 U.S.C. § 160(a), (b)) only the Board has power to decide charges of unfair labor practices and that Section 3(b) (29 U.S.C. § 153(b)) does not permit the delegation of this power. In other words, Meyer says that at some stage of the proceedings it is entitled to a review of the record by the Board before a

¹ In its order sustaining the motion for summary judgment, the Board stated:

"Inasmuch as the Respondent has had in the representation case the opportunity to litigate the issues raised in its Response to Notice to Show Cause and as the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to re-examine the decision made in the representation proceedings, we find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding."

finding can be made that it has been guilty of an unfair labor practice.²

The provisions of 29 U.S.C. § 153(b) authorize the Board to delegate to regional directors its power to determine appropriate units for collective bargaining, to investigate and provide for hearings, determine whether a question of representation exists, and to call an election and certify the results. The Board may review any delegated action of a regional director. See *Labor Board v. Duval Jewelry Co.*, 357 U.S. 1 (1958). The Board, by its rules, has provided for a very limited review. 29 C.F.R. § 102.67.³ After

² Meyer's argument is not a challenge to the rule that the Board is not required to hold a *de novo* hearing upon factual issues which Meyer has or had an opportunity to present before the hearing examiner. *Pittsburgh Glass Co. v. Board*, 313 U.S. 146 (1941); *N.L.R.B. v. Lawrence Typographical Union No. 570*, 376 F.2d 643 (10th Cir. 1967); *N.L.R.B. v. Dewey Portland Cement Co.*, 336 F.2d 117 (10th Cir. 1964).

³ 29 C.F.R. § 102.67 in pertinent part is:

"(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

"(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

"(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record.

..."

exhaustion of his rights to review under the Board's rules, an employer may obtain a court review under 29 U.S.C. § 160. In some cases such review may be accomplished by refusal to bargain, thereby subjecting the employer to an unfair labor practices violation. This is the course followed by Meyer. The review available under § 160 is significantly different from that afforded under 29 C.F.R. § 102.67. The latter review is from the determination by the Regional Director in the establishment of a collective bargaining unit and the conclusion that the petitioners were employees, which in turn was based upon the proceedings before a hearing officer, and is before the Board only on a summary of the record allowed by the rule. The court review under § 160 is upon the entire record and deals with violations arising out of unfair labor practices—in this case, refusal to bargain.

The right of an employer to a Board review of the record of the Regional Director before finding that it is guilty of conduct constituting an unfair labor practice has recently been before the courts with opposite results. In *Pepsi-Cola Buffalo Bottling Company v. N.L.R.B.*, 409 F. 2d 676 (2d Cir. 1969), cert. denied, 396 U.S. 904, the court held that before finding an employer guilty of an unfair labor practice, the Board must review the record "to determine whether his [the Regional Director's] decision was correct, and not whether it was clearly erroneous." In a subsequent case before another panel of judges the same court again considered this question and doubt was expressed by the writer of the opinion as to whether the *Pepsi-Cola* case "gave adequate recognition to the 1959 amendment of § 3(b) of the National Labor Relations Act empowering the Board to delegate various powers to a regional director, and the pertinent

legislative history. . . ." N.L.R.B. v. Olson Bodies, Inc., 420 F.2d 1187, 1190 (2d Cir. 1970). The Fourth Circuit followed the *Pepsi-Cola* case in N.L.R.B. v. Clement-Blythe Companies, 415 F.2d 78 (1969).

The question was more recently carefully considered by the First Circuit in N.L.R.B. v. Magnesium Casting Company, et al., ____ F.2d ____ (May 21, 1970), in which that court "parted company" with the *Pepsi-Cola* decision, holding that by the 1959 amendment to Section 3(b) Congress intended that within the limits specified, the Board was authorized to permit its regional directors to act for it. In answering the argument that the delegation of authority permitted by Section 3(b) is limited to Section 9 matters and cannot affect unfair labor practices proceedings under Section 10, the court said:

"The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers, it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. E.g., *Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Di-

rector's determination—when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded."

Although Judge Kaufman makes an appealing argument in the *Pepsi-Cola* case and the question is not free from doubt, we are convinced that the views expressed in the *Magnesium* case more nearly reflect the intent of Congress in the 1959 amendment to Section 3(b) as illustrated by its legislative history, and we adhere to the views therein expressed on that question.

With reference to the second issue, Congress by statutory language excluded independent contractors from the definition of the term "employee." 29 U.S.C. § 152(3). A determination of this issue requires a reference to the contractual provisions and other facts having to do with the performance of those contracts. Meyer is engaged generally in the business of processing and sale of fluid milk and related items. It employs personnel necessary for the operation of a general dairy business, including office help, production and maintenance workers, supervisors, and wholesale and retail route drivers who are paid salaries. In addition, the Company contracts with retail distributors who agree to purchase Meyer's products exclusively at prices fixed by Meyer, and to sell the same to customers in allocated districts. These distributors are generally known as "milk men" delivering dairy products to individual customers over fixed routes. They furnish their own special trucks for delivery of products within the assigned area and pay all costs and expenses of operation, including helpers if any are needed. Meyer furnishes to the distributors suggested retail prices, but they are not bound by them. The contract provides for certain standards

which the distributors must maintain if they are to retain the territory. These requirements generally are designed to meet health and cleanliness standards, and to promote sales of the Meyer products. Failure to meet the standards can result in a termination of a contract. Otherwise, the distributors have no obligation to Meyer except to pay for the products which they purchase. They do not act for the Company in any manner and are not paid any money by the Company. They have complete control over their sales and to whom credit will be granted. Losses from retail sales are those of the distributors. Income tax and social security payments are made as self-employed persons.* Distributors make their own arrangements for vacations. Many of them develop self-retirement plans, although, at their expense, they may participate in group medical and liability insurance through Meyer. The Company affords to the distributors some advantages in the right to make purchases of vehicles and parts through the Company and to have repair work done in the Company garage, all of which must be paid for and is not compensation.

* The contract states:

"It is agreed by and between the parties hereto that First Party, his agents and employees, in delivering and selling dairy products herein mentioned, is acting as principal, as an independent contractor, on his own responsibility, and in no particular is he acting for or in behalf of, or as agent of the Party of the Second Part, and the First Party shall have no right, power or authority to bind Party of the Second Part by any act or deed on his part, or on the day of his agents, servants or employees, and First Party hereby agrees to indemnify and hold harmless the Party of the Second Part from any loss or liability of whatsoever kind and character arising out of or in any manner connected with the execution of this contract."

If a distributor uses Company employees or vehicles, a charge is made therefor. The Company also furnishes printed material and some forms without cost to the distributors for promotional purposes and for assistance to them in handling the products.

In N.L.R.B. v. United Insurance Co., 390 U.S. 254, 256 (1968), the Supreme Court said that the obvious purpose of the 1959 congressional amendment excluding independent contractors from the definition of "employee" contained in the act "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."⁵ Agency is the relation-

⁵ H.R. Rept. No. 245, 80 Cong., 1st Sess. 18, in referring to the amendment, says:

"An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work

ship between parties through which one is authorized to act for another generally or as to specified matters. Restatement (Second) of Agency § 1 (1957); Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962); Appleby v. Kewanee Oil Company, 279 F.2d 334 (10th Cir. 1960). We think it quite clear that the distributors operate and own their individual businesses for the purpose of profit, the amount of which depends upon their own efforts. The Company pays no salary, commission or expenses. It has no investment of any kind in the distributor's operation. Its only benefit from the contracts is profit from the products purchased. The distributors do not collect any money for the Company. They do not represent and cannot bind the Company in any manner. There are no elements of agency present. They are, in effect, the holders of franchises to sell Meyer Dairy products within an agreed area free from business control of Meyer except that they are required to meet

for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee.' "

standards consistent with similar businesses in the area.⁶ See Continental Bus Systems, Inc. v. N.L.R.B., 325 F.2d 267 (10th Cir. 1963).

The petition for review is granted and the Board's order is vacated.

⁶ In this regard the contract provides:

"First Party shall be held and bound at all times to maintain standards of delivery which will comply with the regulations and policies of public health authorities and meet the standards as established by the Party of the Second Part and consistent with standards of corporations, firms and individuals competitively engaged in similar dairy products business in the Greater Kansas City area in the following particulars:

"1. Insure with such mechanical efficiency of the delivery vehicle as will provide safe, prompt and regular service to customers.

"2. Sanitary condition of the delivery truck, including cleanliness and proper and approved storage of dairy products at temperatures required for wholesome condition of same at time of delivery to customers.

"3. Proper storage of damaged or defective containers of dairy products until re-delivery to Second Party.

"4. Condition of crates and all other paraphernalia employed by First Party in performance of this contract.

"5. State of health and appearance of First Party, his servants and employees, engaged in performance of this contract.

"6. Maintain courteous and salesmanlike relations with customers."

Supreme Court U.
FILED

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IN THE

Supreme Court of the United States ^{E. ROBERT SEAVER, CLERK}

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR OLSON BODIES INC.
AS AMICUS CURIAE**

WILLIAM L. DENNIS

80 Pine Street

New York, New York 10005

*Attorney for Amicus Curiae
Olson Bodies Inc.*

Of Counsel:

DAVID A. MEAD

LAURENCE T. SORKIN

CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street

New York, New York 10005

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INDEX

Statement of Interest	1
Argument	3
Conclusion	17

TABLE OF AUTHORITIES

Cases:

<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	16
<i>Meyer Dairy, Inc. v. NLRB</i> , 429 F.2d 697 (10th Cir. 1970)	4
<i>NLRB v. Bayliss Trucking Corp.</i> , — F.2d — (2d Cir. Oct. 28, 1970).....	5, 11, 12
<i>NLRB v. Belcher Towing Co.</i> , 284 F.2d 118 (5th Cir. 1960)	14
<i>NLRB v. Clement-Blythe Companies</i> , 415 F.2d 78 (4th Cir. 1969)	4
<i>NLRB v. Duval Jewelry Co.</i> , 357 U.S. 1 (1958).....	7
<i>NLRB v. Magnesium Casting Co.</i> , 427 F.2d 114 (1st Cir. 1970)	4, 5, 6, 10
<i>NLRB v. Olson Bodies, Inc.</i> , 420 F.2d 1187 (2d Cir. 1970), <i>petition for cert. filed</i> , No. 238, 1970 Term	2, 5, 9, 10, 11, 13
<i>NLRB v. Purity Food Stores, Inc.</i> , 376 F.2d 497 (1st Cir.), <i>cert. denied</i> , 389 U.S. 959 (1967).....	13
<i>NLRB v. Smith Industries, Inc.</i> , 403 F.2d 889 (5th Cir. 1968)	12
<i>NLRB v. Trancoa Chemical Corp.</i> , 303 F.2d 456 (1st Cir. 1962)	16
<i>NLRB v. United Insurance Co.</i> , 390 U.S. 254 (1968)....	13
<i>NLRB v. Wyman-Gordon Co.</i> , 394 U.S. 759 (1969).....	11

PAGE

	PAGE
<i>National Woodwork Manufacturers Assn. v. NLRB,</i> 386 U.S. 612 (1967).....	6
<i>Packard Motor Car Co. v. NLRB</i> , 330 U.S. 485 (1947) 14	
<i>Pepsi-Cola Buffalo Bottling Co. v. NLRB</i> , 409 F.2d 676 (2d Cir.), cert. denied, 396 U.S. 904 (1969)....3, 4, 12, 13, 14, 15, 16	
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941)	7, 8
<i>Smith Industries, Inc.</i> , 72 L.R.R.M. 1068 (1969).....	12
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	
	6, 15

OTHER AUTHORITIES

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 <i>et seq.</i>).....	6
Section 3(b)	6, 7, 14
Section 9	6
Section 10(c)	11, 16

NLRB Rules and Regulations:

29 C.F.R. § 102.67(c)	2, 8, 9
-----------------------------	---------

Books and Law Review Articles:

Auerbach, <i>Scope of Authority of Federal Administra-</i> <i>tive Agencies to Delegate Decision Making to Hear-</i> <i>ing Examiners</i> , 48 Minn.L.Rev. 823 (1964)6, 7, 11, 15	
Kaufman, <i>Judicial Review of Agency Action: A</i> <i>Judge's Unburdening</i> , 45 N.Y.U.L.Rev. 201 (1970)	
	11, 15, 16

	PAGE
Wellington, <i>Labor and the Legal Process</i> (1968)	12, 13
Winter, <i>Judicial Review of Agency Decisions: The Labor Board and the Court</i> , 1968 Sup.Ct.Rev. 53 (1968)	15
 <i>Miscellaneous:</i>	
107 Cong. Rec. 10223, 12905-32 (1961).....	7
29 NLRB Ann. Rep. (1964)	9
30 NLRB Ann. Rep. (1965)	9
31 NLRB Ann. Rep. (1966)	9
2 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959)	7

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**BRIEF FOR OLSON BODIES INC.
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Statement of Interest

This *amicus curiae* brief* is respectfully submitted on behalf of Olson Bodies Inc. (hereinafter "Olson Bodies") in support of the argument that an employer may not be found guilty of an unfair labor practice growing out of a disputed representation proceeding where the National Labor Relations Board (the "Board") has never reviewed its Regional Director's findings of fact in the underlying representation proceeding.

* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42(2).

Like the petitioner in No. 370, Olson Bodies has been found guilty of an unfair labor practice solely on the basis of a Regional Director's findings of fact,* *NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187 (2d Cir. 1970), *petition for cert. filed*, No. 238, 1970 Term. As the Solicitor General noted in his Memorandum for the National Labor Relations Board in No. 238, Olson Bodies' petition for a writ of certiorari presents "essentially the same [question] as that presented in *Magnesium Casting Company v. National Labor Relations Board*, No. 370, 1970 Term" (Memorandum, pp. 1-2).

Like the petitioner in No. 370, Olson Bodies refused to bargain in order to challenge the representation decision of a Regional Director. In No. 238, Davenport's ballot was excluded by the Regional Director on the ground that Davenport was not a member of the bargaining unit. The result of the election was 110-109 in favor of the Union, 420 F.2d at 1188. If Davenport's ballot had been counted, and if the ballot had been cast against the Union, the vote would have been 110-110, and the Union would not have been certified. Thus, the Union's majority status (and the employer's corresponding duty to bargain) depends on the correctness of the Regional Director's unit determination with respect to Davenport. Olson Bodies is therefore vitally interested in the outcome of No. 370.

* The dispute in *Olson Bodies* involved the status of an employee named Davenport. Following the Regional Director's determination that Davenport was not a plant clerical employee, Olson Bodies filed a timely request for review under 29 C.F.R. § 102.67(e). The Board summarily denied the request without passing on the merits of the Regional Director's determination. Olson Bodies refused to bargain, and an unfair labor practice complaint issued. The Trial Examiner, relying on the Board's "rule against relitigation," refused to review the Regional Director's determination. The Board summarily affirmed the Trial Examiner, again without reviewing the merits of the Regional Director's determination relating to Davenport's eligibility.

Argument

The question presented is whether the Board is required to review the Regional Director's underlying representation decision in a subsequent unfair labor practice proceeding. The Courts of Appeals have divided three ways. In *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, 409 F.2d 676 (2d Cir.), *cert. denied*, 396 U.S. 904 (1969), the Second Circuit held that the Board itself must decide whether an unfair labor practice has been committed, stating:

"The very fact that the Board has great discretion in making judgments, cf. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953), especially in representation matters, *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322 (1946), indicates a legislative purpose to confer final authority in these situations on the Board itself—not a sub-delegatee. . . . In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members.

* * *

"Although the legislative history of the Labor Act does not provide a clear answer to the question involved in this case, Congress' treatment of certain bills involving the Board also supports [the conclusion reached here]. For example, in 1961, the administration proposed reorganization plans for many federal regulatory agencies. These plans sought to increase the power of the agencies to sub-delegate authority to officials generally on the level of the

Board's regional directors. The N.L.R.B. plan would have given these officials the power to make final decisions, subject only to the discretionary review of the agency's members. Although provisions to this effect were enacted into law for the Federal Trade Commission, the Civil Aeronautics Board, and the Federal Maritime Commission, Congress rejected, after long and sometimes acrimonious debate, similar provisions which would have applied to the N.L.R.B., the Securities and Exchange Commission and the Federal Communications Commission. The reason for this carefully considered refusal was precisely that Congress was reluctant to authorize all hearing examiners to render final, unreviewable decisions." 409 F.2d at 680-81.

In *NLRB v. Clement-Blythe Companies*, 415 F.2d 78 (4th Cir. 1969), the Fourth Circuit also appears to have held that the Board must review the record in the representation proceeding before making its own decision in the unfair labor practice proceeding. The rationale in *Clement-Blythe*, as in *Pepsi-Cola*, was that "[t]he Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice." 415 F.2d at 81.

In *NLRB v. Magnesium Casting Co.*, 427 F.2d 114 (1st Cir.), cert. granted, 39 U.S.L.W. 3131 (U.S. Oct. 13, 1970) (No. 370), the First Circuit refused to follow the Second Circuit's decision in the *Pepsi-Cola* case.* It held that the Board was not required to review the Regional Director's findings of fact before concluding that an employer had committed an unfair labor practice by its admitted refusal to bargain. Holding that the procedure followed by the Board "satisfies the requirements of the National Labor

* The Tenth Circuit has also refused to follow *Pepsi-Cola*. See *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970).

Relations Act, the Administrative Procedure Act, and the demands of procedural fairness," 427 F.2d at 121, the court stated:

"Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the [Regional] Director's determination —when not set aside by the Board—is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded." 427 F.2d at 119.

In *NLRB v. Olson Bodies, Inc., supra*, a different panel of the Second Circuit adopted a middle position, holding that Board review is required only where the issue "is difficult and requires a fine-drawn balancing of facts and law." 420 F.2d at 1190. Similarly, in *NLRB v. Bayliss Trucking Corp.*, — F.2d — (2d Cir. Oct. 28, 1970), a still different panel of the Second Circuit concluded that *Pepsi-Cola* should be limited to cases involving "difficult question[s] of mixed fact and law." — F.2d at —. Explaining that at least one of the employer's claims "totter[ed] on the brink of frivolity," the court stated: "We would not add to the Board's already long docket unless we were quite certain, as we were in *Pepsi-Cola*, that the Board's expert and informed views could be of substantial aid to the court's resolution of difficult issues." — F.2d at —.

I.

At the outset we submit that the First Circuit's holding in *Magnesium Casting* rests on a mistaken reading of the legislative history of amended Section 3(b) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 153(b), and should be rejected. Section 3(b), as amended, authorizes the Board "to delegate to its regional directors its powers under [Section 9] to determine the unit appropriate for the purpose of collective bargaining . . . [except that] the Board may review any action of a regional director delegated to him under this [section]."¹ It should be noted at the outset that the powers which the Board is authorized to delegate under amended Section 3(b) are those which are conferred by Section 9. *The power to decide unfair labor practices is conferred by Section 10.* If Congress had intended to delegate the power to decide unfair labor practices as well, it would seem only logical that the 1959 amendment to Section 3(b) would make explicit reference to Section 10. Indeed, the delegation of Section 10 powers "would make so drastic a departure from prior administrative practice that explicitness [by Congress] would be required." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951) (Frankfurter, J.).*

It should also be noted that in 1961 Congress debated and ultimately rejected a bill which would have shifted the locus of decision-making power in unfair labor practice cases from the Board to its subordinates. See Auerbach,

* Similarly, in *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 640 (1967), this Court stated:

"Before we may say that Congress meant to strike from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs, that meaning should plainly appear. . . . We would expect that legislation [of this kind] would be preceded by extensive congressional study and debate, and consideration of voluminous economic, scientific, and statistical data."

Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, 48 Minn. L. Rev. 823, 839 (1964); 107 Cong. Rec. 10223, 12905-32 (1961). This was several years after Congress enacted the 1959 amendment to Section 3(b). If the 1959 amendment did in fact authorize the Board to delegate the power to decide unfair labor practices, then the 1961 bill would have been wholly unnecessary. This only further confirms that the power to decide unfair labor practices was not among the powers delegated to the Regional Directors under amended Section 3(b).

It is also plain from the legislative history of the 1959 amendment that no delegation of Section 10 powers was intended. The purpose of amended Section 3(b) was to ease the Board's workload in representation cases and to speed the certification of bargaining units. See 2 *NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, 1714, 1749-50 (1959). At the same time, however, Congress intended that final authority would remain in the Board by permitting review of a Regional Director's representation decision at the unfair labor practice stage. See 2 *NLRB Legislative History*, 1811-12.

NLRB v. Duval Jewelry Co., 357 U.S. 1 (1958), does not compel a contrary result. *Duval* was decided prior to the 1959 amendment to Section 3(b), and does not involve the delegation of powers conferred by Section 10. Moreover, noncompliance with the *subpoena duces tecum* issued in *Duval* would not have subjected the employer to the potent sanctions arising from the finding of an unfair labor practice.

The First Circuit's holding in *Magnesium Casting* also rests in a mistaken reading of *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941). *Pittsburgh Plate Glass*

holds only that issues decided in a representation proceeding may not be relitigated in the subsequent unfair labor practice proceeding. It does not hold that the decisions of a Regional Director should be insulated from the scrutiny of the Board.

At the time *Pittsburgh Plate Glass* was decided, Congress had not authorized the Board's Regional Directors to decide representation cases. This meant that the issues in a Section 9 representation proceeding as well as those in a Section 10 unfair labor practice proceeding were determined by the Board itself; and this also meant that the same representation question would be before the Board twice. In *Pittsburgh Plate Glass*, this Court held that the Board was not required to review the same representation question twice, noting that the representation and unfair labor practice proceedings "are really one," 313 U.S. at 158, and "a single trial of the [representation] issue is enough." 313 U.S. at 162.

In *Pittsburgh Plate Glass*, the Board did in fact review the evidence adduced at the representation proceeding. 313 U.S. at 153-54. The same procedure was not followed in *Magnesium Casting*: the Board refused to review the Regional Director's determination under 29 C.F.R. § 102.67 (c),* and, relying on its "rule against relitigation," refused to review the Regional Director's determination at the unfair labor practice stage. The employer has thus been found guilty of an unfair labor practice without the Board having reviewed the representation decision even once. This is wholly inconsistent with the rationale of *Pittsburgh Plate Glass*, which would seem to require the Board to review the representation decision at least once before concluding that the employer has violated Section 8(a)(5).

* 29 C.F.R. § 102.67(e) provides that review will be granted only upon a showing of "compelling reasons."

Thus, the employer who has been unable to obtain direct Board review under 29 C.F.R. § 102.67(c) must commit an unfair labor practice to challenge a representation decision, and yet the effect of the Board's "rule against relitigation," as interpreted in *Magnesium Casting*, will be to preclude Board review at the unfair labor practice stage. This is to by-pass the Board entirely in practically all unfair labor practice proceedings arising out of a representation dispute. In 1966, for example, there were 427 requests for review in representation matters, but only 57 requests were granted. See 31 NLRB Ann.Rep. 15 (1966). The figures for earlier years show a similar pattern. See, e.g., 30 NLRB Ann.Rep. 15-16 (1965) (451 requests for review, 63 requests granted); 29 NLRB Ann.Rep. 17-18 (1964) (376 requests for review, 61 requests granted). It should also be pointed out that where the Board has granted review, the Board has reversed or modified its Regional Directors' determinations about 50 per cent of the time. See, e.g., 31 NLRB Ann.Rep. 15-16 (1966) (17 representation cases affirmed, 27 modified or reversed); 30 NLRB Ann.Rep. 15-16 (1965) (34 representation cases affirmed, 25 modified or reversed); 29 NLRB Ann.Rep. 18 (1964) (21 representation cases affirmed, 28 modified or reversed).* The Board's own statistics would seem to refute the argument that no useful purpose would be served by requiring the Board to review its Regional Directors' determinations in representation cases. Compare *NLRB v. Olson Bodies, Inc.*, 420 F.2d at 1190 (review of the Regional Director's determination would be "an idle and useless formality").

* These appear to be the only years for which the Board has broken down its statistics into these categories.

II.

We also submit that the middle position urged by the Second Circuit in *Olson Bodies* (i.e., limiting review to cases where the issue "is difficult and requires a fine-drawn balancing of facts and law") should be rejected on the ground that it provides a wholly unsatisfactory standard for determining when plenary review is required by the Board. The *Olson Bodies* standard is too subjective, and worse yet, it is hopelessly unwieldy. As the First Circuit stated in *Magnesium Casting*:

"The Second Circuit's recent effort—*N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190—to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue 'is difficult and requires a fine-drawn balancing of facts and law.' We shrink from the prospect of attempting such characterizations; in the case before us involving the issues of 'supervisory' status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question is a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress." 427 F.2d at 121.

Olson Bodies is open to additional criticism on the ground that it makes a distinction which is nowhere au-

thorized in the Act. Section 10(e) of the Act, 29 U.S.C. § 160(c), provides, without exception, that the Board shall decide unfair labor practice complaints. It does not provide that the Board shall hear only those unfair labor practice complaints where the issue "is difficult and requires a fine-drawn balancing of facts and law," *NLRB v. Olson Bodies, Inc.*, 420 F.2d at 1190, or where the issue is a "difficult question of mixed fact and law," *NLRB v. Bayliss Trucking Corp.*, — F.2d at —. If Congress had intended to carve out an exception for unfair labor practices that happen to arise in the context of a representation dispute, it would seem only logical that Congress would have amended Section 10(c), which specifies the procedures that the Board must follow in adjudicating unfair labor practice claims. Congress, of course, has done nothing of the sort. Indeed, Congress has repeatedly rejected proposals which would have permitted the Board to delegate decision-making power in unfair labor practice cases to its subordinates. See Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, supra*.

The only other argument advanced in support of the *Olson Bodies* rationale is that there may be some instances where remand for review of the Regional Director's decision would be "an idle and useless formality," 420 F.2d at 1190, citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 6 (1969) (opinion of Mr. Justice Fortas), presumably because the Board would automatically defer to the Regional Director's decision. The argument is based on a kind of omniscience that few courts can be expected to possess. See Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U.L.Rev. 201, 203 (1970). The argument, moreover, is refuted by the Board's own experience. In *NLRB v. Smith Industries, Inc.*, 403 F.2d

889 (5th Cir. 1968), for example, the Fifth Circuit remanded an unfair labor practice case to the Board, and directed that a hearing be held. The hearing was held, and the trial examiner found that no prejudicial conduct had occurred during the representation election involved. *After examining the entire record, the Board itself reversed the trial examiner's findings, invalidated the certification and dismissed the unfair labor practice charge.* *Smith Industries, Inc.*, 72 L.R.R.M. 1068 (1969). In short, there is no basis for assuming that the Board will inevitably endorse the decision of its Regional Director.

The solution proposed in *NLRB v. Bayliss Trucking Corp.*, — F.2d — (limiting review to cases where the issue is "a difficult question of mixed fact and law") fares no better. In the typical representation election, questions of law (e.g., the appropriateness of a bargaining unit, the propriety of pre-election campaign tactics) are inevitably questions of fact;* and in this sense, nearly every representation case presents difficult questions of mixed fact and law.

In *Pepsi-Cola*, for example, the Regional Director determined that 54 soda distributors were employees rather than independent contractors, and hence should be included in a bargaining unit consisting of distributors and driver salesmen. In order to resolve the question, it was neces-

* As Prof. Wellington has noted:

"The Board has a number of criteria it employs in determining the appropriate unit. These include: the bargaining history of the parties; bargaining practices, where they exist, in similar establishments; the organizational arrangement of the employer's establishment; the community of interest of the employees and their physical proximity to one another; and the ability and willingness of the union to represent certain employees." Wellington, *Labor and Legal Process* 44 (1968).

sary for the Regional Director to determine whether the facts which suggested that the soda distributors were independent contractors (*e.g.*, distributors were not eligible for employee benefits such as vacation or sick pay, hospitalization, and insurance) outweighed the facts which suggested that they were employees (*e.g.*, distributors sold soft drinks at prices and terms fixed by the company). If it had been determined that the soda distributors were independent contractors, they could not have been included in the bargaining unit and would not have been eligible to vote in the representation election.

In *Olson Bodies*, the Regional Director determined that Davenport was not a plant clerical employee and was thus ineligible to vote in the representation election. In order to resolve the question, it was necessary for the Regional Director to determine whether the facts which suggested that Davenport was a plant clerical outweighed those which suggested that he was not. In this sense, *Olson Bodies* and *Pepsi-Cola* are indistinguishable.*

In at least one respect, *Olson Bodies* presents a stronger case for Board review than *Pepsi-Cola*, since the issue in *Pepsi-Cola* (*i.e.*, whether the "soda distributors" were employees or independent contractors) involved applying principles derived from the common law of agency. See *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968). As the court noted in *Pepsi-Cola*, this is "a law which the

* Any distinction between "unit determination" and "unit placement" is frivolous. Either issue may be decisive to the outcome of an election. See Wellington, *Labor and the Legal Process* 44 (1968). By determining the appropriateness of the bargaining unit, the Regional Director necessarily enfranchises certain employees for collective bargaining purposes and disenfranchises others. "[S]election of an appropriate bargaining unit gives the majority of employees within that unit the bargaining representative they desire." *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 501 (1st Cir.), cert. denied, 389 U.S. 959 (1967).

court might apply as effectively as the Board." 409 F.2d at 680, n. 6. In contrast, the question of Davenport's right to be included in the bargaining unit requires a large measure of informed discretion on the part of the Board, *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947), and resolution of that question will depend on whether there is a substantial "community of interest" between Davenport and the other plant clericals. *NLRB v. Belcher Towing Co.*, 284 F.2d 118, 121 (5th Cir. 1960). Since the "community of interest" calculus depends on the interaction of a large number of variables, this is precisely the kind of question that should be reviewed by the Board itself rather than a functionary whose appointment is not even subject to consideration by the Senate.

III.

In *Pepsi-Cola Buffalo Bottling Co. v. NLRB*, *supra*, the Second Circuit held that where the employer refuses to bargain in order to challenge the Regional Director's representation decision, the Board itself must review the record on which the representation decision is based "before taking the serious step of declaring that the employer has committed an unfair labor practice." 409 F.2d at 680. We believe that *Pepsi-Cola* was correctly decided, and respectfully urge that this Court follow the rationale of *Pepsi-Cola*.

In *Pepsi-Cola*, the court specifically rejected the argument that amended Section 3(b) authorized the Board to delegate the power to decide unfair labor practices, stating:

"[Amended Section 3(b)] does permit the Board to delegate determination of appropriate bargaining units to a regional director. But this determination does not have the serious consequences that a finding of an

unfair labor practice does. The purpose of the provision added by House and Senate conferees late in the gestation period of the 1959 amendments to the Labor Act, was to speed the work of the Board. *At the same time, however, Congress indicated that the regional directors would be kept in check by permitting review of their decisions by the Board itself.*" 409 F.2d at 680-81, n. 7 (emphasis supplied).

This analysis, of course, is consistent with Congress' persistent refusals to enact legislation permitting the delegation of Section 10 powers. See Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners*, *supra*. "It is fair to say that in all this Congress expressed a mood," *Universal Camera Corp. v. NLRB*, 340 U.S. at 487, and it is also fair to say that *Pepsi-Cola* is faithful to the Congressional mood.

As the author of *Pepsi-Cola* has noted, the advantages of Board review are twofold. It provides a reviewing court with the benefit of the Board's own opinion and experience,* and acts as a deterrent to unjustifiable agency action. See Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, *supra* at 205.

It should be noted that if the unfair labor practice did not arise out of a representation dispute, the employer would have been entitled to full review by the Board, 29

* As Prof. Winter has noted:

"The task of the courts is not to weigh their experience against that of the Board but, first, to compel the Board to state clearly what its experience has been, what inferences it has drawn from that experience, and what impact those inferences should have in the particular case and, second, to decide whether on that basis each decision is a reasoned one." Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup.Ct.Rev. 53, 69.

U.S.C. § 160(c), and as the court observed in *Pepsi-Cola*, "The consequences of committing an unfair labor practice are the same no matter what the source of the dispute." 409 F.2d at 689. It should also be noted that Congress, in enacting 29 U.S.C. § 160(c), was aware of the delays inherent in the processing of unfair labor practice complaints. As this Court declared in *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-78 (1964):

"That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays."

It is true, of course, that the effect of *Pepsi-Cola* may be to add to the Board's admittedly heavy workload. See Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, *supra* at 207. Administrative shortcuts, however, are not the solution to the Board's workload problem. As the First Circuit stated in *NLRB v. Trancoa Chemical Corp.*, 303 F.2d 456, 461-62 (1st Cir. 1962), "Arguments that [administrative agencies] are too busy to do their duty, . . . or that it is more expeditious not to recognize rights, are not very agreeable ones."

Conclusion

For the reasons stated herein, as well as those stated by the petitioner, the judgment of the First Circuit in No. 370 should be reversed.

Respectfully submitted,

WILLIAM L. DENNIS
80 Pine Street
New York, New York 10005
Attorney for Amicus Curiae
Olson Bodies Inc.

Of Counsel:

DAVID A. MEAD
LAURENCE T. SORKIN
CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street
New York, New York 10005

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LOUIS CHANDLER
JEROME H. SOMERS
STONEMAN & CHANDLER
79 Milk Street
Boston, Massachusetts 02109
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
Introduction and Summary	5
I. THE NATIONAL LABOR RELATIONS BOARD VIOLATED SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, BY REFUSING TO MAKE ITS OWN UNIT DETERMINATION OR GIVE PLENARY REVIEW TO A REGIONAL DIRECTOR'S UNIT DETERMINATION IN A REPRESENTATION CASE BEFORE ENTERING AN UNFAIR LABOR PRACTICE ORDER BASED ON SUCH DETERMINATION.	7
A. <i>The Board improperly abdicated its responsibility in Section 10 proceedings to the Regional Director.</i>	12
B. <i>The Board improperly extended the scope of the Section 3(b) amendment to the Act beyond limits set by Congress.</i>	16
C. <i>The legislative history of the Section 3(b) amendment reveals Congress' intent to limit its effect to only representation matters.</i>	22
II. THE NATIONAL LABOR RELATIONS BOARD DEPRIVED THE COMPANY OF ITS ADMINISTRATIVE RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT.	26
CONCLUSION	29
APPENDIX	31

	Page
TABLE OF AUTHORITIES CITED	
<i>Cases</i>	
<i>Aero Corp.</i> , 149 N.L.R.B. 1283 (1964)	9
<i>Amalgamated Clothing Workers v. National Labor Relations Board</i> , 365 F.2d 898 (1966)	20
<i>Amco Electric v. National Labor Relations Board</i> , 358 F.2d 370 (1966)	5
<i>American Federation of Labor v. National Labor Relations Board</i> , 308 U.S. 401 (1940)	28
<i>Boire v. Greyhound</i> , 376 U.S. 423 (1964)	10, 28
<i>Botany Worsted Mills v. United States</i> , 298 U.S. 282 (1929)	25
<i>Cudahy Packing Co. v. Hollard</i> , 315 U.S. 357 (1942)	25
<i>Fleming v. Mohawk Wrecking & Lumber Co.</i> , 331 U.S. 111 (1947)	22
<i>Gamb'e-Skogmo, Inc. v. F.T.C.</i> , 211 F.2d 106 (1954)	15
<i>Insular Chemical Corp.</i> , 128 N.L.R.B. 93 (1960)	9
<i>Jan's Services, Inc.</i> , 131 N.L.R.B. 341 (1961)	9
<i>Lowell Sun Co. v. Fleming</i> , 120 F.2d 213 (1941), aff'd per curiam sub nom. <i>Holland v. Lowell Sun Co.</i> , 315 U.S. 784 (1942)	24
<i>Meyer Bros.</i> , 151 N.L.R.B. 889 (1965)	9
<i>Meyer Dairy, Inc. v. National Labor Relations Board</i> , decided August 18, 1970; No. 531-67, 77 L.R.R.M. 3062	5, 9, 16
<i>Nash-Finch Co.</i> , 178 N.L.R.B. No. 77 (1969)	9
<i>National Labor Relations Board v. Air Control Products, Inc.</i> , 335 F.2d 245 (1964)	14
<i>National Labor Relations Board v. A.P.W. Products Co.</i> , 316 F.2d 899 (1963)	29
<i>National Labor Relations Board v. Chelsea Clock Co.</i> , 411 F.2d 189 (1969)	16

Table of Contents

iii

	Page
<i>National Labor Relations Board v. Clement Blythe Companies</i> , 415 F.2d 78 (1969)	5, 16, 26
<i>National Labor Relations Board v. Duval Jewelry Co.</i> , 357 U.S. 1 (1958)	21, 22
<i>National Labor Relations Board v. Louisville Chair Co.</i> , 385 F.2d 922 (1967)	21
<i>National Labor Relations Board v. Lowell Corrugated Container Corp.</i> , No. 7568, 75 L.R.R.M. 2346 (1970)	16, 17, 27
<i>National Labor Relations Board v. Maine Sugar Industries, Inc.</i> , 425 F.2d 942 (1970)	14
<i>National Labor Relations Board v. Majestic Weaving Co.</i> , 355 F.2d 854 (1966)	15
<i>National Labor Relations Board v. Olson Bodies, Inc.</i> , 420 F.2d 1187 (1970)	5
<i>National Labor Relations Board v. Ra-Rich Mfg. Corp.</i> , 276 F.2d 451 (1960)	29
<i>Northeast Airlines, Inc. v. CAB</i> , 331 F.2d 579 (1964)	28
<i>Pepsi-Cola Buffa'o Bottling Company v. National Labor Relations Board</i> , 405 F.2d 676 (1969), cert. denied 396 U.S. 904 (1969)	5, 12, 16
<i>Phelps Dodge Corp. v. National Labor Relations Board</i> , 313 U.S. 177 (1941)	28
<i>Pittsburgh Plate Glass Co. v. National Labor Relations Board</i> , 313 U.S. 146 (1941)	19, 20
<i>Ramspeck v. Federal Trial Examiners Conference</i> , 345 U.S. 128 (1953)	27
<i>Riverside Press, Inc. v. National Labor Relations Board</i> , 415 F.2d 218 (1969)	20
<i>Shreveport Packing Corp. v. N.L.R.B.</i> 141 N.L.R.B. 1255 (1963)	20
<i>Sopps, Inc.</i> , 175 N.L.R.B. No. 49 (1969)	9
<i>Thrifty Supply Co.</i> , 153 N.L.R.B. No. 34 (1965)	20
<i>United States v. Watashe</i> , 102 F.2d 428 (1930)	25

	Page
<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474 (1951)	8, 12
<i>Wong Yang Sung v. McGrath</i> , 339 U.S. 33 (1950)	27
<i>Statutes</i>	
Administrative Procedure Act, 5 U.S.C. § 551 et seq.	2, 6, 29
§ 554(a)(6)	27
§ 557(b)	15
§ 557(c)	26
28 U.S.C. § 1254	2
National Labor Relations Act, 29 U.S.C. § 151 et seq.	2, 29
§ 2(3)	5, 6, 16, 17, 19, 20, 22, 25
§ 2(11)	16
§ 3(b)	10
§ 3(d)	10
§ 8(a)(1)	6, 9, 19, 23
§ 8(a)(5)	8, 18
§ 9	6, 7, 10, 12, 19
§ 9(e)	13, 18
§ 10	6, 7, 8, 13, 16, 18, 28
§ 10(b)	2, 6
§ 10(e)	6, 28
§ 10(f)	21
§ 11(l)	
<i>Miscellaneous</i>	
Board's Field Manual, Section 11022.3a	9

	Page
Board's Rules and Regulations, Series 8, as amended 29 C.F.R.	
102.64	14
102.67(c)	3, 8, 13, 18
102.67(d)	8
107 Congressional Record 10223, 12905-32 (1961)	26
Gellhorn & Byce, <i>Administrative Law—Cases and Com-</i> <i>ments</i> 1128 (1954)	24
2 N.L.R.B. Legislative History of the Labor Manage- ment and Disclosure Act of 1959 (1959)	
426	24
1327(2)	22
1452(1)	23, 25
1460(1)	23
1465(2)(3)	23
1714(3)	23
1722(3)	23
1749(3)	23
1750(1)	23
1811(3)	23
1811-1812	18
1818(1)	23
1830(2)	23
1856(1-2)	23
Reorganization Plan No. 5 of 1961, 107 Congressional Record 8217 (H. Doe. No. 172)	25
<i>Report on Case Handling Developments at National</i> <i>Labor Relations Board</i> (Quarter ending June 30, 1966), <i>Labor Relations Yearbook — 1966</i> , published by Bureau of National Affairs, Inc.	9

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,
PETITIONER,

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR MAGNESIUM CASTING COMPANY

Opinion Below

The Opinion of the United States Court of Appeals for the First Circuit (A. 200) is reported at 427 F.2d 114 (Appendix, p. 31)¹

¹ "A." refers to the Single Appendix. "Appendix" refers to the Appendix at the end of this Brief.

Jurisdiction

The application for enforcement of an order of the National Labor Relations Board was filed by the Board on November 12, 1969 under the authority of 29 U.S.C. § 160(e). The judgment of the Court of Appeals was issued on May 21, 1970. The Company filed a motion for stay of mandate pending its petition for writ of certiorari on May 29, 1970, and the Court of Appeals issued an order on the same date staying its decree to and including July 10, 1970. On July 9, 1970, the Company filed its petition for writ of certiorari, invoking the jurisdiction of the Supreme Court under 28 U.S.C. § 1254. Certiorari was granted on October 12, 1970.

Statutes Involved

The relevant statutes are the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) (hereinafter called "the Act"), and the Administrative Procedure Act, as amended (60 Stat. 257, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 et seq.).

Question Presented

Did the National Labor Relations Board violate the National Labor Relations Act, as amended, and the Administrative Procedure Act, as amended, in finding that the Company unlawfully refused to bargain with a newly-certified union, where the Board denied the Company's request for review of the Regional Director's unit determination in a representation proceeding and the Board refused to make its own determination or give plenary review to the Regional Director's determination before entering an unfair labor practice order based on such determination?

Statement of the Case

Upon petition for certification of collective bargaining representative of the Company's production and maintenance employees filed pursuant to Section 9(c) of the Act by the United Steelworkers of America, AFL-CIO, hereinafter called "the Union", a hearing was held on April 4, 8, 12 and 18, 1968, before a hearing officer designated by the Regional Director for the First Region of the National Labor Relations Board, hereinafter called "the Board". At issue in the hearing was the exclusion of assistant foremen as supervisors, within the meaning of Section 2(11) of the Act.

Among the employees sought by the Company to be excluded from the unit as assistant foremen was Ivory Scott, who the Company alleged had illegally and actively participated in soliciting not only support for the Union amongst the employees, but also authorization cards for the Union in support of its efforts to obtain a sufficient showing of interest to support its representation petition.

The Regional Director in his Decision and Direction of Election, issued on May 2, 1968, determined that all but one assistant foreman, that exception *not* being Ivory Scott, were employees within the meaning of Section 2(3) of the Act and were not supervisors (A. 110).

Pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. 102.67(e)(d) (Appendix, pp. 46-47), on May 31, 1968, the Company filed a request for review on the basis that the Regional Director's Decision that the three men, including Ivory Scott, were not supervisors was clearly erroneous on the record and such error prejudicially affected the rights of the Company (A. 117). The Board denied the request for review, stating it raised "no substantial issues warranting review" (A. 127), thus leav-

ing the Regional Director's Decision as the only determination made on the merits of this crucial issue.

An election was held on June 21, 1968, in which a majority of those in the unit voted for the Union and the results were certified on October 11, 1968 (A. 131).

Seeking to secure a hearing before the National Labor Relations Board on the issue of the assistant foremen's exclusion as supervisors, especially in the case of Ivory Scott, the Company declined to bargain with the Union.

On November 8, 1968, the General Counsel on behalf of the Board issued a Complaint against the Company, alleging the Company illegally refused to bargain (A. 138). The Company answered, denying that the appropriate unit should include assistant foremen and alleging that the showing of interest obtained by the Union to support its petition was sufficiently tainted by solicitation on behalf of the Union by a Company supervisor so as to warrant dismissal of the petition and revocation of the Certification of Representative (A. 145).

Thereafter, on December 3, 1968, General Counsel without presenting any evidence moved for Summary Judgment. The Company in its Reply to Show Cause Order again raised the issue that the Regional Director erred in concluding the three assistant foremen were not supervisors (A. 147). The Trial Examiner in his Decision issued January 28, 1969 (A. 157) granted the Motion for Summary Judgment without permitting any opportunity for a hearing. On April 17, 1969, the Board issued its Decision and Order (A. 185), affirming without comment the rulings, findings, conclusions and recommendations of the Trial Examiner. At no point in the Trial Examiner's Decision or the Board's Decision and Order was an independent determination made concerning the appropriate bargaining unit.

The Company filed a Motion for Reconsideration on April

29, 1969 (A. 186), on the basis that the Board's failure to review the record before the Regional Director in order to make its own decision as to whether or not the three assistant foremen were supervisors within the meaning of the Act was unlawful, citing *Pepsi-Cola Buffalo Bottling Company v. National Labor Relations Board*, 409 F.2d 676 (C.A. 2, 1969), cert. denied, 396 U.S. 904 (1969). The Board denied the motion "as lacking merit" and stated that with "due deference" to the *Pepsi-Cola* decision, the Board "disagrees therewith and adheres to its previous position until such time as the Supreme Court of the United States rules otherwise" (A. 190). As noted above, this Court denied certiorari in *Pepsi-Cola*.

Upon the Board's application for enforcement, the United States Court of Appeals for the First Circuit enforced the Board's order. In so doing, the Court specifically disagreed with the Second Circuit's *Pepsi-Cola* decision and the Second Circuit's modification of *Pepsi-Cola* in *National Labor Relations Board v. Olson Bodies, Inc.*, 420 F.2d 1187 (1970), and with the Fourth Circuit's decision agreeing with *Pepsi-Cola* in *National Labor Relations Board v. Clement Blythe Companies*, 415 F.2d 78 (1969)².

The Company filed a motion for stay of mandate on May 29, 1970, said motion being granted that same day. On October 12, 1970, the Supreme Court granted certiorari.

Argument

Introduction and Summary

In 1959 the Congress amended Section 3(b) of the Act (Appendix p. 44) by authorizing the Board "to delegate to

² Since the petition for writ of certiorari was filed, the United States Court of Appeals for the Tenth Circuit in *Meyer Dairy, Inc. v. National Labor Relations Board* decided August 18, 1970, No. 531-69, 77 L.R.R.M. 3062 agreed with the First Circuit's decision in the immediate matter.

its regional directors its power under Section [9 of the Act] . . . to determine the unit appropriate for the purposes of collective bargaining. . . except that the Board may review any action of a regional director". The Board in the immediate case did not review the Regional Director's determination in the representation (Section 9) proceedings, and in a subsequent unfair labor practice proceeding under Section 10 of the Act, in which the Board granted summary judgment, adopted the Regional Director's unit determination without giving it plenary review or conducting a trial de novo and based its remedial order to bargain with the Union on this determination.

The Company argued in the Court of Appeals below that Section 10(e) of the Act (Appendix p. 44) requires the Board to make its own determinations of fact in unfair labor practice cases; that Section 3(b) of the Act limited the Regional Director's final authority to rulings only on representation matters (Section 9) and did not constitute a delegation of final authority on any matters involving Section 10 matters (unfair labor practices); that discretionary review by the Board under Section 3(b) is not a sufficient guarantee of the expertise attributed to the Board and necessary to Section 10 proceedings before findings can be made regarding unfair labor practice complaints; that the Administrative Procedure Act, 5 U.S.C. 551 et seq. was violated by the Board because it failed to state the reasons for its conclusions with regard to the unit issue (in fact the Board never reviewed the facts presented on the unit issue at the representation hearing) and that the Court of Appeals, under Sections 10(e) and 10(f) (Appendix pp. 45-46) is limited to reviewing the basis for Board findings, not regional director's decisions.

The Court of Appeals below rejected the Company's contentions, reading into Section 3(b) a broader delegation

than Congress intended, and, we submit, a meaning Congress clearly has sought to avoid.

It is the purpose of this brief to persuade this Court that the Court below was incorrect in holding that the procedures followed by the Board in this case satisfy the requirements of the National Labor Relations Act, as amended and the Administrative Procedure Act, as amended. In the event that this Court reverses the Court below, we request this Court to remand the case to the Court of Appeals with instructions that it not only remand the matter to the Board for proceedings in accordance with this Court's decision, but also that it consider whether an order to bargain is appropriate in view of the delay occasioned by the Board's improper handling of the proceedings and the seventy five percent (75%) turnover of employees which has occurred since the election. (The Court below stated that since the Company's unfair labor practice caused the delay in bargaining after the election, the bargaining order was justified despite the turnover, and the Board was correct in not setting aside the election.)

I. THE NATIONAL LABOR RELATIONS BOARD VIOLATED SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, BY REFUSING TO MAKE ITS OWN UNIT DETERMINATION OR GIVE PLENARY REVIEW TO A REGIONAL DIRECTOR'S UNIT DETERMINATION IN A REPRESENTATION CASE BEFORE ENTERING AN UNFAIR LABOR PRACTICE ORDER BASED ON SUCH DETERMINATION.

The decision of the Court of Appeals condones a procedure prohibited by the specific language of Section 10(c) of the Act by permitting a regional director's findings of fact and decision to be the basis for an unfair labor practice finding without any Board review of that decision or

independent determination of the issues presented in the representation proceeding.

Under Section 10(e) of the Act, the Board must make the ultimate decision whether or not an unfair labor practice has been committed, and it must state its findings of fact before issuing an order to remedy any unfair labor practices it may find. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). In the immediate case there has been no Board determination of an issue necessary to be resolved before an order to bargain with the Union can be issued. At no time did the Board or Trial Examiner in the entire proceedings take evidence on the issue of assistant foremen as supervisors or review the record before the Regional Director in the representation proceedings in making a determination as to the inclusion in or exclusion from the appropriate bargaining unit of assistant foremen.

A four-day representation hearing, which is an investigatory proceeding pursuant to Section 9(e) of the Act, was held before a field examiner of the regional office of the Board. Following that hearing, a decision was issued by the Regional Director finding certain assistant foremen to be included in the unit (A. 110). Pursuant to the Board's Rules and Regulations, the Company filed a request for review (A. 117) on the issue of assistant foremen, in a "self-contained document enabling the Board to rule on the basis of its contents *without the necessity of recourse to the record*" 29 C.F.R. 102.67(e)(d) (emphasis added) (Appendix, pp. 46-47). Under this Board rule, the Company was required to show that (a) the Regional Director's Decision on a substantial factual issue was clearly erroneous on the record, (b) the error prejudicially affected its rights and (c) there are compelling reasons to grant the request for review. The Board denied the request for review stat-

ing it raised "no substantial issues warranting review" and thereby failed to make its own determination (A. 127).

An examination of the Company's request for review discloses substantial and conclusive evidence to prove Ivory Scott was a supervisor. It is incomprehensible that the Board, judging on the basis of this "self-contained document", could find that the request for review raised "no substantial issue warranting review", with knowledge of the ramifications of a finding that Scott was a supervisor and solicited authorization cards for the Union to support its showing of interest necessary to filing a representation petition under Section 9 of the Act.³

The importance of such a finding is based on the Board's prior holdings that an authorization card obtained by a supervisor will not be deemed an uncoerced designation of bargaining authority. *Sopps, Inc.*, 175 N.L.R.B. No. 49 (1969); *Nash-Finch Co.*, 178 N.L.R.B. No. 77 (1969); also *Meyer Bros.*, 151 N.L.R.B. 889 (1965); *Insular Chemical Corp.*, 128 N.L.R.B. 93 (1960); cf. *Aero Corp.*, 149 N.L.R.B. 1283, 1286 (1964); *Jan's Services, Inc.*, 131 N.L.R.B. 341, 345 (1961). In *Report on Case Handling Developments at National Labor Relations Board (Quarter ending June 30, 1966)*, printed in *Labor Relations Yearbook - 1966*, published by the Bureau of National Affairs, Inc., the General Counsel stated on page 288, that in circumstances identical to those the Company alleges in the immediate case:

The General Counsel concluded that the supervisor's manifestations of union support were necessarily weighed by the employees as "coming from the men whose work orders must be obeyed and whose favor

³ The Board's Field Manual specifically states in Section 11022.3a:

A petitioner in order to justify further proceedings on his petition must demonstrate designation by at least 30 percent of the employees in the unit he claims appropriate.

and friendship should, in wisdom, be developed," (*Jan's Services, Inc.* supra, at 345), thus precluding the employees' free choice and coercing them to designate the union as their authorized bargaining agent, despite the absence of evidence of threats or promises. The General Counsel further concluded that, since the union had designated the supervisors as its agents for obtaining authorization card signatures, the coercive impact of these supervisors' conduct was imputable to the union under general principles of agency law, and hence in violation of Section 8(b)(1)(A) of the Act notwithstanding the union may have been unaware of the individual's supervisory status at the time it designated them to act on its behalf . . .

Under the circumstances of the immediate case, the Company refused to bargain with the Union and as expected General Counsel issued a Complaint against the Company alleging a refusal to bargain in violation of Sections 8(a) (1) and (5) of the Act (A. 138). This is the only procedure the Act and the Board's Rules and Regulations provide for in seeking to test a regional director's determination. See *Boire v. Greyhound Corp.*, 376 U.S. 423 (1964); also Section 10 of the Act. Answering the Complaint, the Company reiterated its contention that the assistant foremen, including Ivory Scott, were supervisors and thus should be excluded from the unit and that Scott had solicited authorization cards in support of the Union's representation petition, thus tainting the showing of interest and warranting dismissal by the Board of the Union's petition and revocation of the Regional Director's Certification of Representative (A. 145).

General Counsel then moved for summary judgment, relying on the Regional Director's Decision in the represen-

tation proceeding and stating that issues raised by the Company and determined by the Board in a prior representation case cannot be relitigated in a subsequent unfair labor practice proceeding. The Trial Examiner granted the Motion for Summary Judgment and ordered the Company to bargain with the Union (A. 157).

The Trial Examiner stated in his decision :

Equally the contention that the appropriate unit should have excluded the assistant foreman was litigated before the Board in the representation proceeding (A. 163).

Clearly he relied on the finding of the Regional Director, as he stated in his decision :

With regard to the fact that Scott solicited authorization cards and participated in the Union's organization drive, inasmuch as he was found to be an employee by the Board no relevance is given this fact (A. 164).

This latter remark was erroneous since the Board did *not* decide the issue, but merely refused to review the record in order to make its own decision.

On April 17, 1969, the Board affirmed the rulings of the Trial Examiner and adopted his findings, conclusions and recommendations without discussion (A. 185). Therefore, the Company's decision to risk an unfair labor practice in order to obtain a Board determination on the unit issue went awry, frustrated by the refusal of the Trial Examiner and the Board to review the record independently of the Regional Director's conclusions. It is this failure of the Board which the Company respectfully submits is unlawful.

Pepsi-Cola Buffalo Bottling Co. v. National Labor Relations Board, *supra*.⁴

A. *The Board improperly abdicated its responsibility in Section 10 proceedings to the Regional Director.*

Notwithstanding that Section 10(c) of the Act specifically provides that the Board itself must determine if a party has committed an unfair labor practice, the Board abdicated its responsibility in the immediate matter by relying on the ruling of the Regional Director without so much as a review of the transcript elicited at the representation hearing. Discretionary review by the Board at the unfair labor practice case level was *not* contemplated by Congress. *Universal Camera Corp. v. National Labor Relations Board*, *supra*, at 492 (1951). As Judge Kaufman stated in *Pepsi Cola*, *supra*, at 680:

In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a regional director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. Moreover, the Board's experience is particularly relevant and desirable in deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are invoked. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947); *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1947).

⁴ Respondent moved for reconsideration based on the *Pepsi-Cola* case, but the Board denied the motion, stating it disagreed with the Second Circuit and would adhere to its previous position until this Court rules otherwise (A. 190-191).

The expertise of the Board members is the basis for their selection as agency heads. The record in this case clearly indicates that no review of the hearing transcript occurred by either the Trial Examiner or the Board. In the decision of the First Circuit Court, the Court noted that the Company emphasized that the Board never reviewed the actual evidentiary record in this case, but dismissed the statement as "misleading", noting that the Company had submitted its request for review and "the Board did review the evidence as summarized by the Company" and concluded that the Company's claim presented "no substantial issues warranting review". This statement by the Court, not the statement of the Company, is "misleading". The Company submits that the Board's statement that this request for review raised "no substantial issues warranting review" was incredible in view of the facts presented in the request and the references to the record. Under Section 10(e) of the Act an unfair labor practice must be proven by a "preponderance of the testimony taken"; Section 10(b) of the Act requires the hearing "... to be conducted in accordance with the rules of evidence applicable in the district courts of the United States ...". On the other hand, in a petition for representation, as distinguished from an unfair practice case, the criterion for Board review of a regional director's decision established in 29 C.F.R. 102.67(e) (Board's Rules and Regulations) is limited to situations where a regional director's decision on a substantial factual issue is "clearly erroneous on the record". The Board is not even required to review any part of the record and may make its determination solely on its judgment as to whether the Company's request for review raises "substantial issues warranting review."

In the present case, the denial means that the Board did not review the record before the Regional Director, and the decision of the Regional Director, even if *not* supported

by evidence in the transcript, is binding in the unfair practice procedure. Nowhere in the record does the Board or General Counsel assert that the Board examined the transcript of the representation hearing. Regional directors do not sit as hearing officers in representation proceedings. Rather, a hearing officer designated by the regional director hears the case, but does not write the decision; the decision is written by another person assigned to that task in the regional office who presents a draft to the regional director who may or may not have read the transcript and who may or may not edit the draft before he signs it. Under Board practice credibility resolutions which may be necessary in representation proceedings before a decision may be rendered are made *not* by the hearing officer who is most capable of making those resolutions, but by the decision writer who was not present during the hearing to observe the demeanor of the witnesses or to judge the relative credibility of witnesses whose testimony clearly conflicts. 29 C.F.R. 102.64.

In the case at bar the Company in its Reply to Show Cause Order alleged that it possessed newly-discovered evidence, which it outlined, that witness Ivory Scott admitted after the hearing that he had withheld information concerning his responsibility and authority as assistant foreman during his testimony in the representation hearing. Scott's testimony was strongly in conflict with the evidence presented by the Company. Therefore, the newly-discovered evidence went directly to the issue of Scott's supervisory status and was extremely germane to the credibility resolution necessary to the decision on that issue. The Board's denial of a hearing in the unfair labor practice proceeding deprived the Company of its only opportunity to present such evidence. See *National Labor Relations Board v. Maine Sugar Industries, Inc.*, 425 F.2d 942 (1st Cir. 1970); *National Labor Relations Board v. Air*

Control Products, Inc., 335 F.2d 245, 249 (C.A. 5 1964). Such conduct deprives the Company of a basic administrative right. See 5 U.S.C. § 557(b); *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106 (8th Cir. 1954); see also *Amco Electric v. National Labor Relations Board*, 358 F.2d 370 (9th Cir. 1966); *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854 (2nd Cir. 1966)⁵. Thus the practical effect of the First Circuit Court's decision is not only improperly to condone by the Board delegation of its own Section 10 duties in unfair labor practice cases to regional directors, but in fact to a field examiner or to a field attorney who is an employee not of the Board, but rather of the General Counsel's office — the party originally "prosecuting" the matter before the Board.

It is submitted that Congress certainly did not contemplate that a regional director's determination of an appropriate unit would be binding in an unfair practice proceeding. Nor is there any indication that Congress intended that General Counsel by use of the summary judgment procedure would "rubber stamp" determinations made by regional directors whose hearings are held and decisions made without the application of the rules of evidence. There is no legal warrant for the deprivation of right granted by the Act merely to expedite case handling and to secure consistent results. Such conduct creates a serious conflict of interest as to the regional director for while he does not personally prosecute unfair practice cases, it is not inconceivable that the employees in his office subordinate to him who try unfair practice cases consult with him on stra-

⁵ Section 5(c) of the APA (5 U.S.C. § 557(b)) states that the parties to formal proceedings have the right to have the same officer who presided at the reception of evidence make the recommended or initial decision. Representation proceedings are not subject to this requirement and do not meet this requirement. However, unfair labor practice proceedings are subject to this protection, and therefore the Company was denied this protection.

tegy; his self-interest militates in favor of recommending a motion for summary judgment, thus avoiding any in depth review of his Decision and Direction of Election or a trial on the merits by the Trial Examiner or by the Board. *National Labor Relations Board v. Chelsea Clock Co.*, 411 F.2d 189 (1st Cir. 1969). Clearly such behavior violates the requirement for the separation of Board and General Counsel functions under Sections 3(b), 3(d) and 10(c) of the Act.

B. The Board Improperly Extended the Scope of the Section 3(b) Amendment to the Act Beyond Limits Set by Congress.

The crucial issue before the Court is whether Section 3(b) of the Act, which provides a regional director with authority to rule in representation proceedings *only*, relieves the Board of its duty and responsibility to rule on all issues presented in unfair labor practice proceedings. The Court of Appeals in the Second and Fourth Circuits in *Pepsi-Cola*, *supra*, and in *Clement-Blythe*, *supra*, respectively have answered that question in the negative, while the First Circuit in the immediate case and the Tenth Circuit in *Meyer Dairy, Inc. v. National Labor Relations Board*, *supra*, in which the Court cited the First Circuit's opinion, have answered in the affirmative.

The First Circuit recently appears to have contradicted its decision below in the immediate matter in its Opinion in *National Labor Relations Board v. Lowell Corrugated Container Corp.*, No. 7568, September 30, 1970, 75 L.R.R.M. 2346. In the latter case, the Employer refused to bargain in order to test the Regional Director's failure to sustain its objections to an election. The objections claimed that the Regional Director's failure to issue Notices of Election and ballots in Spanish and English was arbitrary and ca-

precious and contrary to Board policy. Although the Court enforced the Board's order because the Employer failed to object at the appropriate time and because of established law on the undisputed facts, nonetheless the Court rejected the Board's contention that it only has to consider new evidence. The Court noted that neither the Trial Examiner nor the Board considered the evidence before the Regional Director and therefore in fact did not review the basis of the Regional Director's action so as to determine its validity prior to the issuance of the Board's order to bargain. The Board argued it does not have to "relitigate" the issue if no new evidence is presented, but the Court stated, *supra* at 2347:

We do not agree that the Board reviewed the rejected matter. Nor do we agree that there is no general duty to do so. Somewhere, sometime, someone must review the basis of the Regional Director's decision to ascertain whether in fact it was arbitrary, or in violation of Board policy or the Act. If the Board is here claiming that it, rather than the trial examiner, does so, we must find that its pro forma decision affirming the examiner's findings and rulings neither recognizes such a duty, nor indicates its performance.

In the case at bar, the Trial Examiner and the Board, like the Trial Examiner and the Board in the *Lowell Corrugated* case, did not review the evidence before the Regional Director to determine its validity. Just as in *Lowell Corrugated*, the Board here neither recognized nor performed its statutory duty in unfair labor practice proceedings.

Under Section 3(b) of the Act the Board may delegate to its regional directors its powers "under Section 9 to determine the unit appropriate for the purpose of collective bargaining . . .". Discretionary review is permitted under

the Board's Rules, 29 C.F.R. 102.67(e) on a highly restrictive basis. Nowhere is the Board permitted to delegate its final authority in unfair labor practice proceedings, which bear the possibilities of findings of unfair labor practices and of court enforceable remedial orders. Where an integral part of these unfair labor practice proceedings involves a representation matter, the litigants are entitled to the personal attention of the Board members and the reflection of their expertise, which Congress considered in approving their appointments. While Congress permitted regional directors more discretion in representation proceedings, it also provided the added insurance that regional directors' decisions would be subject to ultimate review by the Board. See 2 N.L.R.B. Legislative History of the Labor Management and Disclosure Act of 1959, 1811-12 (1959). By failing to review the Regional Director's decision as to the unit issue and incorporating that decision without review as part of its unfair labor practice findings, the Board has acted contrary to the explicit intent of Section 10(c) of the Act and has deprived the Company of its specific rights as a litigant under the Act and under the Administrative Procedure Act.

As a matter of fact and of law the sole means available to an employer for challenging a regional director's determination in a representation case is by inviting an unfair labor practice by refusing to bargain with the certified union and thereby creating the opportunity for the first time to litigate the matter before the Board. That is the reason the handling of the representation issue is called merely an "investigation" by the Act and by the Board and the rules of evidence are not applicable. See Sections 9(e) and 10(b) of the Act.

Although the Board argued in its brief to the First Circuit Court (and the Court accepted the Board's position) that representation and unfair labor practice proceedings

are "really one and a single trial of the representation issue is enough", relying on *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146 (1941), it is clear not only from a reading of the Act, but also from the same case the Board cites that the Board in fact must make a determination of *its own* on the unit issue when it becomes a relevant issue in an unfair labor practice proceeding. Section 3(b) of the Act, which was a post-1941 amendment to the Act, permits the Board to delegate its authority to a regional director only in representation matters. The sole purpose of this delegation was to expedite the election process so as to determine matters affecting representation as promptly as possible. At the time of the *Pittsburgh Plate Glass* case, in 1941, the Section 3(b) delegation to the regional director of Section 9 powers did not exist, so no contemplation was made of an occasion when the Board would not rule on a unit issue in an unfair labor practice proceeding. In *Pittsburgh Plate Glass* the Board itself in fact did rule on the unit issue. Clearly the Board would not be required to rule twice on the same evidence on the unit issue. But the Board *is* required to rule *at least once* on the unit issue! Furthermore, the Administrative Procedure Act (1947) had not been enacted at the time *Pittsburgh Plate Glass* was decided (1941). The only argument raised in that case was a denial of the right to a hearing in violation of the Fifth Amendment.

The First Circuit Court stated that the Company's argument "overlooks the well established principle that when the Board resolves an issue in the representation proceeding under its Section 9 powers, it is not required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under Section 10, footnoting that the Board may make determinations if it accepts a request for review or a transfer of the case directly to it by the regional director, and citing *Pittsburgh Plate Glass* *supra*,

Amalgamated Clothing Workers v. National Labor Relations Board, 365 F.2d 898, 902-904 (D.C. Cir. 1966) and *Riverside Press, Inc. v. National Labor Relations Board*, 415 F.2d 281, 284 (5th Cir. 1969). We discussed the *Pittsburgh Plate Glass* case above. In *Riverside Press, Inc. v. National Labor Relations Board*, *supra*, the Employer did not make an effort to have the Trial Examiner or the Board review the decision of the Regional Director and the issue was not raised. In *Amalgamated Clothing Workers v. National Labor Relations Board*, *supra*, the Employer, unlike the present case, neglected to seek a Board determination of the unit issue in the representation proceedings and was thus precluded from raising it before the Board in the unfair labor practice case, such failure constituting a waiver; however, as that case points out, even trial examiners are in dispute as to the intent of Section 3(b). Compare *Thrifty Supply Co.*, 153 N.L.R.B. No. 34 (1965) with *Shreveport Packing Corp.*, 141 N.L.R.B. 1255, 1259 (1963). The Board affirmed both Trial Examiners' decisions, without any opinion or comment.

In the *Amalgamated Clothing Workers* case, the Court points out that where the charge is based on issues not so closely related to the unit issue in the refusal to bargain charge as to make the unit issue the sole issue, the Employer should not be foreclosed from presenting to the Board any underlying issues. Here there is an issue going beyond the unit determination, since involved is a question as to the propriety of the Union's showing of interest which is necessary to substantiate its representation petition. If the showing of interest was obtained by improper means, then the petition itself would be subject to dismissal, the results of the election would be nullified and, therefore, no obligation to bargain could exist. See Footnote 3, *supra*. Whether or not the Company can "relitigate" before the Board should not depend solely on whether the charge involves

issues "so closely related" to the unit issue as to foreclose a hearing de novo or plenary review by the Board of the Regional Director's decision. It must depend also on what defenses are being raised and whether those defenses raise underlying issues which require Board determination. Here the Company sought to raise an issue of extreme importance to the obligation to bargain which was not litigable in the representation proceedings.⁶ The Company is thus entitled to the benefit of the Board's expertise on the issue.

The Court below cited *National Labor Relations Board v. Duval Jewelry Co.*, 357 U.S. 1 (1958), where it claims this Court upheld the Board's delegation of some of its authority to an agent. The Circuit Court in the case at bar misinterpreted *Duval Jewelry* when it stated that "recourse to the Board" was solely a matter of the Board's discretion. The Act under Section 11(1) gives a person served with a subpoena duces tecum the right to "petition" the Board to revoke, and provides that "the Board shall revoke the subpoena, if in its opinion" the statutory requirements were not satisfied. In *Duval Jewelry*, after the subpoenas issued in a representation case, the employer petitioned the Board to revoke them. The Board refused, saying the hearing officer must give an initial ruling. The hearing officer heard the motion to revoke, but denied it. No appeal was taken to the Board. The Supreme Court upheld the delegation by the Board of "the right to make a preliminary ruling" on the motion to revoke, emphasizing the Board's

⁶ In *National Labor Relations Board v. Louisville Chair Co.*, 385 F.2d 922, 925 (6th Cir. 1967), the Court stated, in effect, that the question of the showing of interest is subject to litigation only in an unfair labor practice proceeding and not in the investigation of the representation petition. In the immediate case, the hearing officer in the representation hearing specifically directed the Company to litigate the issue not in a representation hearing, but in an unfair labor practice hearing (A. 10). Now the Board seeks to deny the Company that forum.

Rules provided a means for appeal and that the ruling was merely of a preliminary nature. The Court, *supra*, at 7, noted that the hearing officer:

does not, of course, have the final word. Ultimate decision on the merits of all the issues coming before him is left to the Board. That is true of motions to revoke subpoenas duces tecum, as well as other issues of law and fact. That degree of delegation seems to us wholly permissible under this statutory system. We need not go further and consider the legality of the more complete type of delegation to which most of the argument in the case has been directed.

This latter complete type of delegation of which this Court spoke is the type delegation involved herein. Such a complete delegation can neither be implied nor claimed to be specifically authorized by Section 3(b). See *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947).

C. *The Legislative History of the Section 3(b) Amendment Reveals Congress' Intent to Limit Its Effect Only to Representation Matters.*

It is submitted that the Court below misconstrued the legislative history of Section 3 (b) and the intent of Congress. In Congressman Morse's analysis of H.R. 8342, which contains the ultimate language of the amendment to Section 3(b), 2 N.L.R.B. Legislative History of the Labor Management and Disclosure Act of 1959, 1327(2) (1959), he states "The possibility of overloading the NLRB is significantly countered by permitting regional directors to decide representation cases" (as distinguished from unfair practice cases).

Senator Dirksen noted Congress' concern over giving

regional directors substantial authority when he suggested the Senate be provided with confirmation authority to ensure their objectivity and expertise. 2 N.L.R.B. Legislative History, 1452(1). Senator Goldwater agreed. 2 N.L.R.B. Legislative History, 1460(1). In fact, the legislative history talked of the danger of giving the regional officers any of the Board's functions in unfair labor practice matters even though subject to appeal. Remarks of Congressman Smith (Iowa), 2 N.L.R.B. Legislative History 1465 (2) (3).

Congressman Barden specifically stated that the amended Section 3(b) resulted from the House conferees' decision that "*there should be some consideration given to expediting the handling of some of the representation cases.*" Therefore the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under Section 9 of the (A)et". 2 N.L.R.B. Legislative History 1714(3). Congressman Udall stated that 3(b) "will enable the Board to handle more cases, and to handle them more expeditiously, by decentralizing its supervision of elections". 2 N.L.R.B. Legislative History, 1722(3). Congressman Kearns noted that the proceesing of representation cases accounts for more than fifty percent (50%) of the Board's workload and that 3(b) should encourage parties to reach consent agreements on elections. 2 N.L.R.B. Legislative History 1749(3)-1750(1). Congressman Griffin stated that 3(b) "relates only to representation matters". 2 N.L.R.B. Legislative History 1811(3); see also Congressman Hagen's remarks at 2 N.L.R.B. Legislative History 1818(1). Senator Goldwater's comments were addressed to the expedition of Board cases by giving more authority in representation matters to the regional directors. 2 N.L.R.B. Legislative History 1830(2), 1856 (1-2).

In 1958 the Board retained McKinsey & Co., Inc., a firm of management consultants, to survey its internal proce-

dures. That firm found that the Board acted on nearly twenty-five percent (25%) of the representation cases and suggested that new procedures (prehearing elections) could be used so as to reduce the time the Board spends in representation cases so that the "staff time saved could be used to advantage on the anticipated monthly C case load" (unfair labor practice proceedings). S. Rep. No. 187 on S. 1555, 86th Congress, 1st Session, 2 N.L.R.B. Legislative History 426.

The scant legislative history of the amendment reveals that the primary purpose was to expedite *representation matters* so as to leave the Board more time to exert its efforts in unfair labor practice cases. The amendment was specific in its limitations to certain specific powers under Section 9 of the Act. That the Board seeks to extend those specific limitations by its own methods and argues that its position better effectuates Congress' intent is irrelevant. Congress spoke of only representation matters and if it desired to make these findings binding in an unfair labor practice case such as this, it could well have added words to that effect. But the fact remains Congress did not do so! And the legislative history never speaks of making the regional director's decision binding in unfair labor practice cases where the Board, despite the Company's request, has neither granted plenary review nor held a hearing *de novo*. The delegation by the Board in the circumstances of this case exceeds its statutory authority and is therefore ultra vires agency. See Gellhorn & Byce, *Administrative Law — Cases and Comments* 1128 (1954).

Where Section 3(b) does not permit delegation by the Board of powers other than those specifically mentioned as Section 9 powers, the Board's delegation of final authority on the unit issue in the immediate unfair practice case trespasses on the function of Congress. *Lowell Sun Co. v. Fleming*, 120 F.2d 213, 216 (1st Cir. 1941), aff'd per

curiam sub nom. *Holland v. Lowell Sun Co.*, 315 U.S. 784 (1942). Where the words of the amendment to Section 3(b) are so explicit and the legislative history so clear as to Congressional intent to limit regional directors' authority to representation matters, there is no basis for the Board to interpret Congress' action to have a broader meaning. Senator Dirksen's remarks at 2 N.L.R.B. Legislative History 1452(1) reflect concern that regional directors will not possess that expertise and fairness that are the prerequisites for Board members and are the subject of Congressional inquiry when confirming appointment to the Board. His concern was that those persons below the Board level should not possess the authority reserved to the Board by Congress unless the Senate shall have had the opportunity to interrogate those persons and assure itself of the expertise of those persons. He spoke in the context of legislation widening the authority of the regional director in representation matters only. One can be sure that had he contemplated that a regional director's determination in a representation hearing would go unreviewed by the Board and be the basis of a Board finding of an unfair labor practice, appointments to the office of regional director would have been made subject to Senate confirmation.

As this Court stated in *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929), at 289, "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Furthermore, where, as here, the delegation of Section 9 power was specific, Congress must, by implication, have intended to limit that delegation and forbid delegation of other powers. *United States v. Watashe*, 102 F.2d 428 (10th Cir. 1939); see also *Cudahy Packing Co. v. Hollard*, 315 U.S. 357 (1942).⁷

⁷ It should be noted that President John F. Kennedy's proposed Reorganization Plan No. 5 of 1961, 107 Cong. Rec. 8217 (H. Doc. No. 172), would have authorized the Board to delegate its authority

II. THE NATIONAL LABOR RELATIONS BOARD DEPRIVED THE COMPANY OF ITS ADMINISTRATIVE RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The procedure used by the Board in this case does not comply with the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record....

The record before this Court contains no Board statement of the reasons or basis for making its findings or reaching its conclusions. That this method of handling an unfair labor practice proceeding is proscribed was stated by Circuit Judge Butzner in *National Labor Relations Board v. Clement-Blythe Companies*, *supra* at 81:

When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, and the Board is charged with the duty of stating the reasons why the Board concluded the facts showed a violation of the law, e.f. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 195 (1941); 2 Davis, *Administrative Law* § 16.12 (1958).

in unfair labor practice proceedings to trial examiners, subject to the Board's discretionary right to review the action of the trial examiner upon its own initiative or upon petition of a party to or an intervenor in such proceedings. It was defeated in Congress. 107 Cong. Rec. 10223, 12905-32 (1961). It is only logical that if Congress would not permit a trial examiner's findings of fact and conclusions of law to have final authority in an unfair labor practice proceeding, Congress certainly had not permitted the Board to give such authority to a regional director when it amended Section 3(b) in 1959.

No statutory exception to this rule exists because critical elements of the controversy were determined preliminarily by the Regional Director in the representation proceedings. The Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice. 29 U.S.C. § 169(e) (Emphasis added)

If the position of the Court below were adopted, the Administrative Procedure Act would be circumvented by permitting certain aspects of unfair labor practice cases to escape its requirements, namely, those issues decided by the regional director, since the Act does not apply to the representation case hearings. The Administrative Procedure Act excludes from its requirements "the certification of worker representatives", 5 U.S.C. § 554(a)(6), and this extends also to the Board's grant or denial of review of a regional director's decision. *National Labor Relations Board v. Clement-Blythe Companies*, supra at 82⁸. When a case involves an unfair labor practice, this Act applies and the Board must state its findings and conclusions and the reasons or basis therefor. Nowhere in the record did the Board state its reasons or basis for a unit determination⁹.

⁸ The Administrative Procedure Act was passed to insure the rights of litigants before federal administrative agencies and among other purposes, to guarantee them against the loss of their rights because of an agency's desire to expedite various matters. See *Ramspeck v. Federal Trial Examiner's Conference*, 345 U.S. 128 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

⁹ The Court below states that it may review the decision of the Regional Director. Nowhere in the Act is the Court given such reviewing authority. Furthermore, that the trial examiner adopted the Regional Director's findings of fact is inconclusive since there is no evidence the trial examiner even examined the transcript of the representation hearing. See *National Labor Relations Board v. Lowell Corrugated Container Corp.*, supra. In addition, since the Administrative Procedure Act does not apply to a Regional Director's decision

The failure of the Board to make its own determination on the unit issue requires the courts to engage in guesswork or speculation as to whether the Board did in fact review the transcript of the representation hearing prior to denying the request for review and what facts relevant in the record support its denial. No court should be expected to engage in such activity when attempting to review the action of an administrative agency. *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579, 586 (1st Cir. 1964); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197 (1941).

Furthermore, Sections 10(e) and 10(f) of the Act provide Courts of Appeals with the authority to review *only* determinations of the Board and not those of a regional director. This restriction is well-recognized by the courts which have consistently limited parties to the unfair labor practice procedure when efforts are made to test substantive decisions in representations cases in the district courts of the United States. See *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401 (1940); *Boire v. Greyhound Corp.*, *supra*. This statutory review is to be based on whether or not the findings of the *Board* with respect to questions of fact are supported by substantial evidence on the record.¹⁰ Such a review is more limited than that of the Board reviewing a trial examiner's deci-

in a representation hearing, when the Regional Director, as he sometimes does, merely states his conclusions and the Board acts as it did here and rules that the issue cannot be relitigated, the protection afforded by the Administrative Procedure Act is in fact rendered meaningless by the decision of the Court below.

¹⁰ The "standard of review" used by the Board to judge whether it should review the Regional Director's decision is whether or not it was "clearly erroneous". The Board was never asked to test the Regional Director's decision on a "substantial evidence" standard and, therefore, the court is being asked not to review a Board determination, which it is empowered to do, but rather to review a Regional Director's decision, which it has no authority to do, and to speculate upon what evidence, if any, the Board rested its findings.

sion. *National Labor Relations Board v. A.P.W. Products Co.*, 316 F.2d 899, 904 (2nd Cir. 1963). In the case at bar, neither the Board nor the Trial Examiner at any time indicated that it had reviewed the record before the Regional Director or had made its own findings.

It should also be noted that according to Section 10(c) of the Act the Trial Examiner and the Board must use a "preponderance of the evidence" test in making its findings of fact. Neither the Trial Examiner nor the Board reviewed the evidence in the representation hearing to determine if a preponderance of the evidence supported the Regional Director's decision before recommending and issuing, respectively, an unfair labor practice finding and remedial order. See *National Labor Relations Board v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 454 (2nd Cir. 1960). The only action the Board took was to find *without* reviewing the record no "clearly erroneous" decision by the Regional Director. Yet, the Court below in discussing the unit issue, after admitting Scott's case "presents more difficulty", says the Court should not substitute its judgment in the close cases and gives "deference to expertise". (A. 204). It is the use of this "expertise" of which the Company was deprived by decision of the Court below, in violation of the National Labor Relations Act, as amended, and the Administrative Procedure Act, as amended.

Conclusion

It is respectfully submitted that this Court should reverse the Court of Appeals' decision and remand the case to the Court below with instructions that it not only remand the matter to the Board for proceedings in accordance with this Court's decision, but also that it consider whether in any event an order to bargain is appropriate in view of the

delay caused by the Board's improper handling of the proceedings and the seventy-five percent (75%) turnover of employees which has occurred since the election.

Respectfully submitted,

LOUIS CHANDLER
JEROME H. SOMERS
STONEMAN AND CHANDLER
79 Milk Street
Boston, Massachusetts 02109
Attorneys for Petitioner

November 24, 1970

APPENDIX

[UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT]

No. 7462.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

MAGNESIUM CASTING COMPANY,
RESPONDENT,
and

UNITED STEELWORKERS OF AMERICA,
INTERVENOR.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and BOWNES
District Judge.

Abigail Cooley Baskir, Attorney, with whom *Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Marshall F. Berman*, Attorney, were on brief, for petitioner.

Jerome H. Somers, with whom *Louis Chandler* and *Stoneman and Chandler* were on brief, for respondent.

May 21, 1970.

COFFIN, *Circuit Judge*. On the basis of the evidence adduced at a unit determination hearing on March 14, 1968, the Regional Director concluded that six of the seven assistant foremen whose status was in dispute were employees rather than supervisors and thus includible in the proposed bargaining unit at the Magnesium Casting Company plant in Hyde Park, Massachusetts. The Company's Request for Review, contending that three of the six — Scott, Morris, and Massey — were supervisors, was denied

by the Board as raising no substantial issues warranting review. On June 21, the United Steelworkers of America won the election 140 to 59.

Pursuing the accepted method for challenging such unit determinations, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-477 (1964), the Company refused to bargain with the Union. The Company's answer to the ensuing unfair labor practice complaint renewed the contention concerning the status of Scott, Morris, and Massey. In response to the General Counsel's Motion for Summary Judgment, the Company asserted the existence of newly discovered evidence concerning Scott's status and his activities on behalf of the Union. The Trial Examiner granted the Motion for Summary Judgment, concluding that the Company's evidence regarding Scott was not newly discovered and thus that the Regional Director's determination in the representation proceeding should be followed. The Board affirmed the Summary Judgment and adopted the Trial Examiner's conclusion that the Company had committed an unfair labor practice by its refusal to bargain.

Thereafter, the Company filed a Motion for Reconsideration with the Board, contending that the holding in *Pepsi-Cola Buffalo Bottling Co. v. N.L.R.B.*, 409 F.2d 676 (2d Cir. 1969), cert. denied, 396 U.S. 904 (1969), required the Board to make its own findings of fact regarding the status of Scott, Morris, and Massey. Noting its disagreement with the *Pepsi-Cola* rule, the Board denied the Motion, and comes to us seeking enforcement of its order to bargain.

I.

The Company's initial contention is that the inclusion of Scott, Morris, and Massey in the bargaining unit was improper because all three are supervisors within the meaning of the NLRA, 29 U.S.C. § 151 *et seq.* Under section 9 of the Act, only "employees" are properly includable in a bargaining unit, which provision combines with the sec-

tion 2(3) definition of "employee" to exclude from the bargaining unit "any individual employed as a supervisor". Section 2(11) defines "supervisor" as

"... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[Emphasis added.]

Since the definition is set forth in the disjunctive, it is generally agreed that the possession of any one of the listed powers is sufficient to confer "supervisory" status, e.g., *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1089 (5th Cir. 1969), as long as "such authority is not merely of a routine or clerical nature, but requires the use of independent judgment". See, e.g., *Amalgamated Clothing Workers v. N.L.R.B.*, 420 F.2d 1296, 1300 (D.C. Cir. 1969).

Nevertheless, as Judge Woodbury stated in *N.L.R.B. v. Swift and Company*, 292 F.2d 561, 563 (1st Cir. 1961),

"... the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'."

With that in mind, the Regional Director's determination should be sustained if supported by substantial evidence.

The instant case presents one of those situations where

the gradations of authority are particularly difficult to ascertain. The company has approximately 250 employees in the unit found appropriate, some 22 of whom work in the Products Division. Within that Division there are two sections—one for plating and finishing, another for assembly and packaging—each with 10-12 men under the supervision of a foreman, both of whom are conceded to be “supervisors.” It is within these 10-12 man sections that the present controversy arises. The Company contends that all four assistant foremen are also supervisors; the Regional Director found that only Zagrafos—who worked with 9 employees and had exercised supervisory powers on several occasions—was a supervisor, and that Morris, Massey, and Scott were not.

Morris and Massey are employed in the assembly and packaging section of the Products Division. Working with 2-4 others in separate groups, each performs routine supply and inspection functions in addition to the normal packaging work of the section. Both are paid somewhat more than their fellow workers, but substantially less than their foreman. Neither has ever exercised any of the powers specified in section 2(11).¹ Both refer any important decisions to their foreman, who makes the daily work assignments and checks the work of each of the men in the section, including Morris and Massey, at regular 10 minute intervals throughout the working day. Whatever responsibility these assistant foremen may have vis-a-vis their fellow workers, it is of a fairly routine nature; while some judgment is obviously required to determine what problems

¹ We accept the proposition that possession of section 2(11) authority is sufficient, and that such authority may be possessed even though it has not been exercised. E.g., *N.L.R.B. v. Leland Gifford Co.*, 200 F.2d 620, 625 (1st Cir. 1952); *N.L.R.B. v. Metropolitan Life Insurance Co.*, *supra* at 1173. However, in cases where possession of such authority is disputed, lack of exercise thereof is one factor in determining whether or not the authority is indeed possessed.

should be referred to the foreman, such judgments hardly suggest a finding of "supervisory" status. We are troubled by their attendance at bi-weekly "management" meetings but that one factor does not alter the substantial evidence that these men are not supervisors.

Scott presents more difficulty. He is specially trained to perform the critical plating function in the Products Division. During his seven months as an assistant foreman, he once recommended a raise for a fellow worker who soon thereafter received it, and he once prevailed on another employee—by threatened loss of job—not to leave work abruptly in the middle of the day. However, it does not strike us as unusual that the most skilled of three or four men in a shop would command respect from his co-workers and his foreman even though he possessed no "supervisory" powers. Moreover, the quality control work in which he engages concerns the products themselves and only indirectly reflects on his own work and that of the other employees; he is *not* charged with the responsibility of assessing their general capabilities. *Compare N.L.R.B. v. Metropolitan Life Insurance Co., supra* at 1174-1177. As with Morris and Massey, however, his frequent attendance at the "management" meetings lends credibility to the Company's contentions.

However, if "deference to expertise" and "substantial evidence" mean anything in this area of labor law, it is that courts should not substitute their judgment in the close cases. We have found only one recent decision where the Board's determination that certain men were not supervisors was reversed by a court of appeals. *N.L.R.B. v. Metropolitan Life Insurance Co., supra; compare Illinois State Journal-Register, Inc. v. N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969); *N.L.R.B. v. Little Rock Downtowner, Inc., supra* at 1089; *N.L.R.B. v. Swift and Company, supra* at 563. *Metropolitan Life* presented a much clearer case of "super-

visory" status than do the inconclusive facts regarding Scott. We hold that the Regional Director's determination with regard to these three men is supported by substantial evidence.

Additionally, the Company contends that the Trial Examiner erred in refusing to consider its "new evidence" concerning the status and activities of Scott. We have just recently demonstrated our readiness to require trial examiners to hear such evidence when appropriately presented. *N.L.R.B. v. Maine Sugar Industries, Inc.*, F.2d

(1st Cir., May 15, 1970). However, because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he could not have produced it at the appropriate time. The Company's first proffer merely stated that Scott had "admittedly withheld information . . . concerning his full responsibilities and authority as an assistant foreman", without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. The Trial Examiner's refusal, therefore, was not error.

Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence and we have no occasion to concern ourselves with Scott's activities on behalf of the Union or with the issue raised in *N.L.R.B. v. Metropolitan Life Insurance Co., supra* at 1178.

II.

Our conclusion above does compel us to confront the issue set forth and discussed in *Pepsi-Cola Buffalo Bottling, supra* at 679-681: whether the National Labor Relations Board must make its own findings of fact before it can conclude that a Company has committed an unfair labor

practice by its admitted refusal to bargain. The Board in our case adhered to its "rule against relitigation", which provides in effect that the Board's denial of review of the Regional Director's findings of fact, after review of a summary of the evidence and the law prepared by the Company, is sufficient. 29 C.F.R. § 102.67(d)(f). The *Pepsi-Cola* decision struck down that part of the rule which allows the Board to find an unfair labor practice without making its own findings, which holding has apparently been embraced by the Fourth Circuit. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d 78, 82 (4th Cir. 1969). More recently, however, *Pepsi-Cola* has been distinguished by another panel of the Second Circuit, with Judge Friendly expressing his doubts about the *Pepsi-Cola* decision. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (2d Cir. 1970).² Having previously cited *Pepsi-Cola* in dicta as the existing law on this point—*N.L.R.B. v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969)—we now must decide whether to follow that decision.

Viewing the problem as tabula rasa, there may be some merit to the propositions that discretionary review by the Board is not a sufficient guarantee of the exercise of the expertise attributed to the Board; that section 10(c) of the Act requires the Board to make its own determinations of fact in unfair labor practices cases, *see Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 492 (1951); and that Congressional rejection of proposals to delegate final authority to hearing examiners suggests a similar reluctance to delegate such authority to Regional Directors, *Pepsi-Cola Buffalo Bottlers, supra* at 681.

But the slate was etched rather clearly, we think, when Congress amended section 3(b) of the Act, 28 U.S.C.

² *Pepsi-Cola* has also been distinguished in *State Farm Mutual Auto Ins. Co. v. N.L.R.B.*, 413 F.2d 947 (7th Cir. 1969); *see also N.I.R.B. v. Process Corp.*, 412 F.2d 215, 217-218 (7th Cir. 1969).

§ 153(b), in 1959. Section 3(b) begins by authorizing the Board to delegate to three or more of its members "any and all of the powers which it may exercise", and then, as amended, provides that "[t]he Board is also authorized to delegate to its regional directors its power under section [9 of the Act] ... to determine the unit appropriate for the purposes of collective bargaining ... except that the Board may review any action of the Regional Director ..." Taken together, the two provisions reflect a Congressional decision to allow the Board — within the specified limits — to permit its delegates to act in its stead.

The Company contends that the section 3(b) amendment *on its face* confines the Regional Directors to the exercise of powers under section 9, and thus that a Regional Director's unit determination pursuant to section 9 can have no effect in a subsequent unfair labor practice proceeding under section 10. That argument, however, overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers,³ it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10. *E.g., Pittsburgh Plate Glass Co. v. Labor Board*, 313 U.S. 146 (1941); *Amalgamated Clothing Workers v. N.L.R.B.*, 365 F.2d 898, 902-904 (D.C. Cir. 1966); *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284 (5th Cir. 1969). Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination — when not set aside by the Board — is entitled to the same weight in the subsequent proceeding that the Board's own determination would have been accorded.

³ The Board may be called on to make such determinations, either after accepting a Request for Review or after transfer of the case by the Regional Director. See 29 C.F.R. § 102.67.

The legislative history behind the section 3(b) amendment, while not extensive, confirms the breadth of the intended delegation. Senator Goldwater, a member of the Conference Committee which had inserted this amendment which had not appeared in the bills passed by the House and Senate, offered the most complete explanation for the amendment. The purpose was "to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." It was made clear that the regional directors would be "required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act." As one safeguard against possible abuse of the delegated power the Board was assured the right of continuous supervision over its delegates, so that the Board could "refuse to delegate authority to handle all or any part of the proceedings in contested representation cases." 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959) (Remarks of Senator Goldwater).⁴

We draw two conclusions from the amendment and this history. First, the primary purpose behind the amendment was the desire to expedite the final disposition of a part of the Board's caseload. The Board delegated its authority over elections and certifications, and, by its "rule against

⁴ We note also that both Congressman Griffin—co-sponsor of the House bill and an active advocate for the Conference version which eventually became law—and Congressman Barden—Chairman of the House Committee on Education and Labor whose earlier bills, H.R. 4473 and 4474, contained the first mention of the section 3(b) amendment—inserted brief explanations of the section 3(b) amendment about ten days prior to final passage. 2 NLRB Legislative History, 1811(3), 1812(3). Both focused primary attention on the Board's ability to require adherence by its Regional Directors to its rules and precedents. Were the Board additionally expected to make its own findings, there would be no reason for this concern to be voiced at all.

relitigation", decided that all issues finally resolved in such proceedings need not be redetermined in the ensuing unfair labor practice proceeding. Thus, while the Company's interpretation — based on *Pepsi-Cola* — would expedite only elections and certifications but not the disposition of the issues resolved therein, the Board's interpretation makes it unnecessary to redetermine each of those issues, thereby effectuating the Congressional purpose more completely.

Secondly, the section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.

Furthermore, it is important to recognize that Congress did build in a second safeguard against possible abuse by the Regional Directors of the delegated powers. 2 NLRB Legislative History, 1811(3) (Remarks of Congressman Griffin); *ibid.*, 1812(3) (Remarks of Congressman Barden). In both the representation proceeding and the unfair labor practice proceeding, the "ultimate decision" remains with the Board, just as much as in *N.L.R.B. v. Duval Jewelry Co.*, 357 U.S. 1, 8 (1957), where the Court upheld the Board's delegation of some of its authority to an agent because "ultimate decisions on the merits of all the issues coming

before him is left to the Board", although recourse to the Board there, as here, was solely a matter of the Board's discretion.

The Company makes much of the argument that the Board has never reviewed the actual evidentiary record in this case. However, that statement is misleading, for the Board did review the evidence as summarized by the Company in its Request for review, 29 C.F.R. § 102.67(d), and on that basis it concluded that the Company's claims regarding the status of the three assistant foremen presented no substantial issues warranting review. It is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions.⁵ Of course there is nothing to stop the Board from itself reconsidering the evidence adduced in the representation proceeding which is before it in the unfair labor practice proceeding. See 29 C.F.R. § 102.48(b).

The Fourth Circuit, embracing the *Pepsi-Cola* rule, was most persuaded by the absence of any findings by the Board for the courts of appeals to review. *N.L.R.B. v. Clement-Blythe Companies*, 415 F.2d at 81-82. However, both Senator Goldwater's remarks and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the

⁵ The adequacy of this procedure is illustrated by the record before us. The Request for Review contained a complete summary of the relevant evidence, with page references to the transcript of the hearing, as well as a fully documented legal memorandum. In effect, the procedure enables the protestant to marshall its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes.

appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C. § 10(d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. We therefore reject the notion that either section 10(e) of the Act or the Administrative Procedure Act, 5 U.S.C. § 557, is offended by the fact that we review the Regional Director's findings which have been adopted by the Board.

The Second Circuit's recent effort — *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d at 1190 — to confine the *Pepsi-Cola* holding seems to us an unsatisfactory compromise: actual Board review and determination is only required where the issue "is difficult and requires a fine-drawn balancing of facts and law". We shrink from the prospect of attempting such characterizations; in the case before us involving the issue of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress. We conclude that the Board's expertise was brought to bear to the extent required by section 3(d) when it denied review of the Regional Director's determination.

We therefore part company with both recent decisions of the Second Circuit, and hold that the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness.

The Company's final contention is that it should be relieved of its duty to bargain because of a substantial turnover of its employees since the election. The Company's unfair labor practice, its refusal to bargain, having caused this delay since election, the Board's refusal to set aside the election is sustained. *Cf. N.L.R.B. v. Better Val-U Stores of Mansfield, Inc.*, 401 F.2d 491, 494-495 (2d Cir. 1968).

The petition for enforcement is granted.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq) are as follows:

SEC. 3 (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . .

SEC. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue an order dismissing the said complaint.

SEC. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

SEC. 10 (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provision of the Board's Rules and Regulations is 29 C.F.R. § 102.67. It provides in part:

Sec. 102.67 Proceedings before the regional director; further hearing; briefs; actions by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.

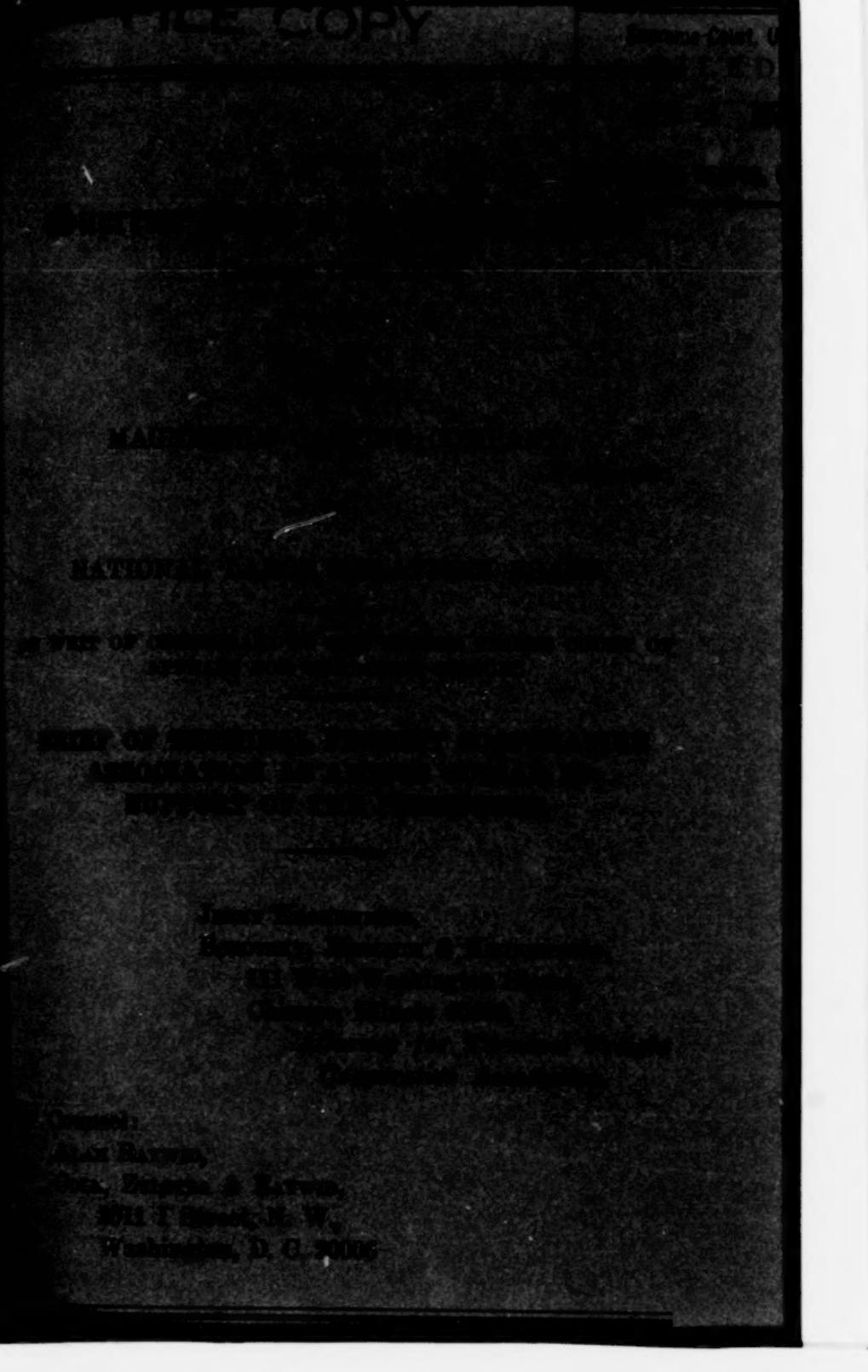
(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request

for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

* * *



INDEX.

	PAGE
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	4
I. The "Rule Against Relitigation"	4
II. The Board's Failure to Accord Mandatory Plenary De Novo Review in All Unfair Labor Practice Cases Is Inconsistent With the Re- quirements of the National Labor Relations Act, the Board's Own Rules and Regulations and the Administrative Procedure Act	7
III. Discussion of Factors Cited in Favor of Appli- cation of "Rule Against Relitigation" in Unfair Labor Practice Cases	12
A. Congressional Purpose and the Legislative Scheme	12
B. The Effect of This Court's Decision in Pittsburgh Plate Glass Co. v. N. L. R. B.	14
C. The Policy Consideration Purportedly Favoring the "Rule Against Relitigation"	16
CONCLUSION	17

INDEX OF AUTHORITIES.

American Automobile Association v. Squillaceote, 310 F. Supp. 596 (D. C. Wise., 1970)	14
Frito Co., Western Division v. N. L. R. B., 330 F. 2d 458, 463 (C. A. 6, 1964)	9
Leeds & Northrup Co. v. N. L. R. B., 357 F. 2d 527 (CA 3, 1966)	9

N. L. R. B. v. Mastro Plastics Corp., 354 F. 2d 170 (CA 2, 1965) cert. den. 384 U. S. 972 (1966)	10
N. L. R. B. v. Miami Coca Cola Bottling Co., 360 F. 2d 569 (CA 5, 1966)	10
N. L. R. B. v. Pugh & Barr, Inc., 194 2d 217, 220 (CA 4, 1952)	9
N. L. R. B. v. Stocker Mfg. Co., 185 F. 2d 451, 454 (CA 3, 1950)	9
Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146, 157-162 (1941)	14, 15
Terminal Freight Cooperative Association, et al. v. Solien (CA 8, Nos. 20462, 20472)	2
Terminal Freight Cooperative Association, et al. v. N. L. R. B. (CA 3, No. 18948)	2
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 492 (1951)	8
Utica Mutual Insurance Company v. Vincent, 375 F. 2d 129 (CA 2, 1967), cert. den. 389 U. S. 839 (1967)	14
S. D. Warren Co. v. N. L. R. B., 342 F. 2d 814, 816 (CA 1, 1965)	9

Administrative Procedure Act.

5 U. S. C. A. § 556	9
5 U. S. C. A. § 556(b)	10
5 U. S. C. A. § 556(d)	10
5 U. S. C. A. § 557	9
5 U. S. C. A. § 557(b)	10, 11
5 U. S. C. A. § 557(c)	10

National Labor Relations Act.

Section 3(b), 29 U. S. C. § 153(b)	4, 5, 6, 12, 13, 15
Section 9(c)(1), 29 U. S. C. § 159(c)(1)	13
Section 10(e), 29 U. S. C. § 160(e)	
.....	2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17

*National Labor Relations Board Rules and
Regulations and Statements of Procedure.*

Section 101.12(a), 29 C. F. R. § 101.12(a)	8
Section 101.20(c), 29 C. F. R. § 101.20(c)	13
Section 102.42, 29 C. F. R. § 102.42	11
Section 102.45(a), 29 C. F. R. § 102.45(a)	8
Section 102.45(l), 29 C. F. R. § 102.45(b)	8
Section 102.46(a), 29 C. F. R. § 102.46(a)	7
Section 102.48, 29 C. F. R. § 102.48	7
Section 102.48(b), 29 C. F. R. § 102.48(b)	7
Section 102.67(b), 29 C. F. R. § 102.67(b)	6
Section 102.67(c), 29 C. F. R. § 102.67(c)	5, 6
Section 102.67(d), 29 C. F. R. § 102.67(d)	6
2 Legislative History of the Labor-Management and Disclosure Act of 1959, 1856(2) (1959)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 370.

MAGNESIUM CASTING COMPANY.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

**BRIEF OF TERMINAL FREIGHT COOPERATIVE
ASSOCIATION AS AMICUS CURIAE IN
SUPPORT OF THE PETITIONER.**

INTEREST OF THE AMICUS CURIAE.

Terminal Freight Cooperative Association (herein called "Terminal"), is a non-profit shippers' association consisting of forty-five independent companies which receives less-than-carload and less-than-truckload shipments of freight from its members, consolidates such shipment into carload lots in order to secure the advantage of lower costs through large volume shipment, and reships such goods to

members' plants and other facilities at locations throughout the United States.

Terminal is currently engaged in proceedings in the United States Court of Appeals for the Eighth Circuit (*Terminal Freight Cooperative Assn., et al. v. Solien*, Nos. 20462, 20472), and for the Third Circuit (*Terminal Freight Cooperative Association, et al. v. NLRB*, No. 18948) whose decisions will involve an interpretation of the very same statutory provision as does the instant case and, like the present case, raises questions concerning the manner and content of the Board's duty to review its agents' disposition of unfair labor practice cases.

In the present case, the petitioner has been denied any review of an adverse unfair labor practice ruling by the National Labor Relations Board in which the Board would have access to the record in the case and could make independent findings of fact as are specifically required by the language of Section 10(c) of the National Labor Relations Act. In Terminal's pending Eighth Circuit case a regional director has approved a settlement agreement purporting to remedy unfair labor practices perpetrated against Terminal without incorporating any findings of fact in that agreement. The "record" which will go to the Board for its "review" of the appropriateness of that settlement agreement will neither contain any such findings by the regional director nor any other material from which the Board may make independent findings of fact. Yet, Section 10(c) of the Act, which governs and describes the manner in which the Board shall review the disposition by its agents of all unfair labor practice cases, requires precisely such independent findings of fact by the Board.

Thus, in Terminal's Eighth Circuit case, because of the paucity of the "record" before it, the Board will make no such findings nor meaningfully review the propriety of the

disposition there of the unfair labor practice case. In the instant proceeding the Board has refused to accord such review and make such findings because of its "rule against relitigation". In both cases the requirements of Section 10(c) would seem to require the Board to do so.

In Terminal's Third Circuit case the regional director determined that a complaint based upon Terminal's unfair labor practice charges should issue. Thereafter he delayed its issuance while seeking to settle the underlying case and without revoking his decision that the charges had merit. Ultimately the regional director approved a unilateral settlement over Terminal's objections. The settlement agreement contained no findings of fact. Terminal sought to appeal the director's action to the Board and to avail itself of the guarantee provided in Section 10(c) of an independent review by the Board of the director's acts. The Board refused to review the propriety of the director's conduct contending that the case was not properly before the Board for review. In its brief the Board indicated that even if the case were properly lodged for review, the nature of the review the Board would accord would not meet the standards set out in Section 10(c).

Terminal believes that this Court's decision interpreting the scope of Section 10(c) of the Act in this case will control, or surely affect, the disposition of the Third and Eighth Circuit cases.

This brief is submitted in order to apprise this Court of some of the ramifications of its decision herein and in an effort to persuade this Court of an interpretation of Section 10(c) which does justice to the terms of the statute itself, to Congress' purpose in enacting it, and to the requirements of logic and equity as they relate to all of those cases.*

* This brief is filed with the written consent of counsel for both parties in accordance with Rule 42(2) of the Court.

ARGUMENT.

This case presents the question as to whether the Board's rule barring the consideration and review in unfair labor cases of issues previously litigated in representation cases constitutes an impermissible infringement of rights granted in Section 10(e) of the Act.

This question arises as a result of an inherent conflict between the proposition that the Board may refuse to review the record or consider the merits in an unfair labor practice proceeding of a decision made in a representation case on which decision the Board then relies in finding the existence of an unfair labor practice, with the inconsistent proposition that under Section 10(e) of the Act the Board's conclusion that an unfair labor practice has been committed "shall" be based on *its* review of "the preponderance of the testimony" and "shall" be supported by "*its* [the Board's] findings of fact . . .".

I. THE "RULE AGAINST RELITIGATION".

In 1959, the National Labor Relations Act was amended by the addition of the following language to Section 3(b) of the Act, 29 U. S. C. § 153(b):

" . . . The Board is also authorized to delegate its regional directors its powers *under Section 9* to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board *may* review any action of a regional director,

delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director." (Emphasis added.)

Thus, and for the first time in 1959, the Board was authorized to exercise a discretionary review of decisions made by regional directors in representation cases, pursuant to the expressed right to delegate the decision-making powers under Section 9. Since Section 9 applies only to representation cases, the terms of this amendment neither authorized the Board to delegate any of its decision-making functions or responsibilities in unfair labor practice cases nor to limit its duty to accord plenary review in such cases.

The Board gave effect to the amendment of Section 3(b) by establishing a limited standard for reviewing representation decisions of its regional directors. (Rules and Regulations, § 102.67(c), 29 C. F. R. § 102.67(c)):

"The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for the reconsideration of an important Board rule or policy."

This limited standard of review is intertwined with the fact that a regional director's decision in a representation pro-

ceeding "shall be final", subject to the Board's granting the complaining party's request for review, the filing of which, however, "shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director". (Rules and Regulations § 102.67(b), 29 C. F. R. § 102.67(b).)

In promulgating this restricted standard of review *in representation cases* arising under Section 9, the Board acted within the ambit of the authority expressly conferred by Congress in its amendment to Section 3(b).

However, the Board, having created that standard, proceeded to apply it as well to the review of unfair labor practice cases arising by virtue of Sections 8 and 10 of the Act. Accordingly, in § 102.67(d) of its Rules and Regulations, the Board provided that:

"... Failure to request review [of decisions in representation cases] shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. . . . Denial of a request for review . . . shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

The effect of this extension of the specific authority conferred by Congress in the amended Section 3(b) of the Act was to deny review by the Board in cases arising under Section 10 to all parties who failed to obtain review in related cases under Section 9 pursuant to the restrictive certiorari-like tests established in § 102.67(c) for such representation cases. Thus the Board has administratively amended both Sections 3(b) and 10(c) of the Act.

II. THE BOARD'S FAILURE TO ACCORD MANDATORY PLENARY DE NOVO REVIEW IN ALL UNFAIR LABOR PRACTICE CASES IS INCONSISTENT WITH THE REQUIREMENTS OF THE NATIONAL LABOR RELATIONS ACT, THE BOARD'S OWN RULES AND REGULATIONS AND THE ADMINISTRATIVE PROCEDURE ACT.

The procedure prescribed by Congress for the Board's review of unfair labor practice cases is set out in Section 10(c) of the Act and makes no special provision for cases raising issues which were previously litigated in a representation case. That Section requires the Board, without stated exception, to review the entire record of the case before it, to form an independent (*i.e.*, de novo) opinion as to the direction of the preponderance of the evidence, and to frame and issue its own findings of fact. In view of the scope of this absolute direction, the decision of a trial examiner which is to be reviewed by the Board constitutes merely a "proposal" or "recommendation".

The Board's own Rules and Regulations recognize this absolute right to review by the Board of unfair labor practice cases. A trial examiner's "recommendation" becomes final only "in the event no timely or proper exceptions are filed". (Rules and Regulations § 102.48.) In all other events, merely upon the complaining party's filing timely and proper exceptions to the trial examiner's "decision or to any other part of the record or proceedings . . .", the Board will either: (i) "decide the matter forthwith, *upon the record*" (emphasis added), (ii) decide the matter after oral argument, (iii) reopen the record to receive further evidence "before a member of the Board or other Board agent or agency", (iv) "close the case upon compliance with recommendations of the trial examiner", or (v) "make other disposition of the case". (Rules and Regulations § 102.46(a); 102.48(b).)

Thus, without regard to the Board's *standard* of review in unfair labor practice proceedings, it is clear that such review will *always* be granted a party thereto as a matter of right. This conclusion is reinforced by the Board's Statements of Procedure § 101.12(a), 29 C. F. R. § 101.12(a), which provides that where a party:

"... files exceptions to the trial examiner's decision, the Board . . . reviews the entire record . . . [and] issues its decision and order . . . The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action."

And, upon the filing of the trial examiners' decision with the Board, an order is automatically entered transferring "the case" to the Board. (Rules and Regulations § 102.45(a), (b), 29 C. F. R. § 102.45(a), (b).)

The view that Section 10(c) of the Act requires the Board to accord not merely plenary but also *de novo* review in all unfair labor practice cases has become well established by courts which have interpreted that Section. As this Court stated in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 492 (1951):

"The Court of Appeals deemed itself bound by the Board's rejection of the examiner's findings because the court considered these findings not 'as unassailable as a master's'. 179 F. 2d at 752. They are not. Section 10(c) of the Labor Management Relations Act provides that 'If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . .' 61 Stat. 147, 29 U. S. C. (Supp. III) § 160(c), 29 U. S. C. A. § 160(c)). The responsibility for decision thus placed on the Board is

wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous'. Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required."

To similar effect, with respect to the duty imposed by Section 10(e) on the Board, are *NLRB v. Stocker Mfg. Co.*, 185 F. 2d 451, 454 (CA 3, 1950): "The Board retains its normal obligation to examine the record and reach its own independent conclusions"; *NLRB v. Pugh & Barr, Inc.*, 194 F. 2d 217, 220 (CA 4, 1952), holding that an obligation is imposed on the Board independently to examine the record when a complaining party filed proper exceptions; *Frito Co., Western Division v. NLRB*, 330 F. 2d 458, 463 (CA 6, 1964); "The Board cannot fulfil its obligation to uphold the purposes of the Act if it conceives itself powerless to exercise an independent examination of the record of the case presented by the General Counsel"; *S. D. Warren Co. v. NLRB*, 342 F. 2d 814, 816 (CA 1, 1965), cert. den. 383 U. S. 958 (1966), where the court held that while the manner of the Board's consideration of evidence in unfair labor practice cases may not be subject to judicial inquiry, the evidence must be considered so that "the administrative body can and does make the necessary findings"; and *Leeds & Northrup Co. v. NLRB*, 357 F. 2d 527 (CA 3, 1966), where the court held that whenever an unfair labor practice complaint is issued the statutory scheme contemplates that the Board will accord an independent review of the disposition of the case by the Board's agents at the inferior levels.

The interpretation of Section 10(e) for which the *amicus* argues in this brief finds further support from the provisions of the Administrative Procedure Act ("APA"), 5 U. S. C. A. §§ 556, 557. These provisions have particular relevance as an aid in interpreting Section 10(e) since unfair labor practice proceedings under the Labor Act have

been held to be within the coverage of the APA. (*NLRB v. Mastro Plastics Corp.*, 354 F. 2d 170 (CA 2, 1965), cert. den. 384 U. S. 972 (1966); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F. 2d 569 (CA 5, 1966)).

The APA provides the following procedural guarantees, all of which are consistent with the view that Section 10(e) affords plenary, de novo review by the Board, and all of which are eliminated by the application by the Board of the "rule against relitigation" in any unfair labor practice cases:

(1) The right to a hearing at which "the proponent of a rule or order [has] . . . the burden of proof". (5 U. S. C. A. § 556(d));

(2) An opportunity, prior to decision, to submit for the consideration of the officers participating in such decision proposed findings or conclusions (5 U. S. C. A. § 557(c));

(3) The unqualified right to have the ultimate record in the case reveal the ruling upon and basis for each finding or conclusion made (5 U. S. C. A. § 557(e)):

"All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record . . .";

(4) The right to have presiding at the taking of evidence either the agency, one or more members of the body which comprises the agency, or one or more independent hearing examiners appointed as provided in Section 11 of the APA (5 U. S. C. A. § 556(b)):

(5) The right to have the same officer who presided at the reception of evidence make the recommended or initial decision. (5 U. S. C. A. § 557(b).)

(6) Assurance that the deciding officer shall not consult with any person on any fact in issue unless upon notice and opportunity for all parties to participate.
(5 U. S. C. A. § 557(b).)

Predictably, the National Labor Relations Act, and the Board's Rules and Regulations dealing generally with procedures in unfair labor practice cases, duplicate many of the safeguards guaranteed in the APA. Thus, for example, Section 10(c) imposes upon the General Counsel the burden to prove the commission of unfair labor practices by "the preponderance of the testimony taken"; the Board's Rules give any party the right to file proposed findings and conclusions with the trial examiner before he renders a decision (§ 102.42); and the statutory scheme contemplates that the same trial examiner who hears the evidence will make a recommended decision to the Board.

It is for all these reasons anomalous, at best, for the Board to apply its "rule against relitigation" in those unfair labor practice cases involving issues which were decided in a prior related representation case. Such conduct by the Board represents impermissible delegation to its regional directors of its responsibilities—a delegation which is without authorization either in Section 3(b) or in any other Section of the Act. It violates the unqualified duty imposed by Section 10(c) and by its own Rules and Regulations which prescribe the procedures to be followed in *all* unfair labor practice cases. And it violates the safeguards guaranteed in the APA which include the right to a hearing in the unfair labor practice case itself at which testimony is taken; at which the General Counsel has the burden of proof; at which a trial examiner will hear the evidence, accept proposed findings, and make his own findings; and for a *de novo* review from the ultimate source of administrative authority (the Board) which is obliged to make and justify its independent findings and conclusions.

III. DISCUSSION OF FACTORS CITED IN FAVOR OF APPLICATION OF "RULE AGAINST RELITIGATION" IN UNFAIR LABOR PRACTICE CASES.

The principle justification for the application of the "rule against relitigation" to unfair labor practice cases consists in Congress' alleged delegation to the Board, in the 1959 amendment to Section 3(b), of the authority to sub-delegate its decision-making duty in such cases to its regional directors.

The difficulties with this argument, as have been shown, are that Section 3(b) is expressly made applicable to cases arising under Section 9, which would not include unfair labor practice cases, and that the duties imposed on the Board under Section 10(c) are stated in absolute and unqualified terms. Moreover, nothing in the legislative history reveals any Congressional purpose to amend Section 10(c) when it amended Section 3(b).

A. Congressional Purpose and the Legislative Scheme.

The Congressional debates preceding the amendment of Section 3(b) revealed a purpose to expedite Board procedures. But which procedures? The remarks of Senator Goldwater, a member of the Conference Committee which had proposed this amendment, revealed its purpose to be "to expedite final disposition of cases by the Board, by turning over part of its caseload to the regional directors for final determination." The Senator then clarified his general reference to "cases" by specifying that he had in mind ". . . contested representation cases". (2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1856 (2) (1959)). The combination of this delegation of representation case authority with the additional authority to permit the Board to limit its review

of the regional directors' resulting representation decisions did achieve the desired "expedition." It is, therefore, unnecessary, in order to find such expedition, to extend the scope of the matters delegated beyond the decision in and review of representation cases, to which cases Senator Goldwater and Section 3(b) exclusively and specifically referred. Moreover, had Congress intended its amendment of Section 3(b) to affect the absolute duty which it had previously imposed on the Board in Section 10(c) to review the disposition of unfair labor practice cases, then it is reasonable to assume that Congress would have effected such a further amendment.

Another basis for doubting that Congress intended its amendment to Section 3(b) impliedly to qualify the rights granted in Section 10(c) traces to the substantial differences between the two kinds of cases. Whereas representation cases are specifically stated to be "nonadversary in character" (Board's Statements of Procedure § 101.20(c)), the unfair labor practice case results in a permanent injunction by the Board with the possibility of subsequent contempt sanctions. Further, while the burden of proof in an unfair labor practice complaint case is upon the General Counsel to establish his position by a preponderance of the evidence, there is no burden whatever upon the Board or its agents in representation proceedings, so long as it is shown that "a question of representation exists". (Section 9(c)(1) of the Act). Indeed, it is typical in representation cases for the employer to present its witnesses first in view of their greater familiarity with the operations of their business even when the case is filed by a union. No finding is made in representation cases that any party has sustained any evidentiary burden. Nor does the Board, in a related subsequent unfair labor practice proceeding limited, by the "rule against relitigation", to the findings in the representation case, make any judgment as to whether

the General Counsel sustained any burden of evidentiary proof in accordance with the standard contained in Section 10(c). (For an account of other critical differences in the safeguards afforded in the two types of Board proceedings see *Utica Mutual Insurance Company v. Vincent*, 375 F. 2d 129 (C. A. 2, 1967), cert. den. 389 U. S. 839 (1967); and *American Automobile Association v. Squillacote*, 310 F. Supp. 596 (D. C. Wisc., 1970)). It follows, therefore, that since Congress, in Section 10(c), established a party's right to plenary, de novo review by the Board of unfair labor practice proceedings in which substantial procedural safeguards were afforded, that Congress would not deliberately have eliminated the right to such review of other such proceedings in which no comparable safeguards were provided—without saying so precisely and directly by an explicit amendment of Section 10(c).

Indeed, Section 10(c) represents tangible evidence of Congress' desire to afford the fullest independent review by the Board of the disposition of its Complaints in unfair labor practice cases. The effect of the Board's "rule against relitigation" is to deprive parties of just such an independent review; pursuant to its certiorari-type standards the Board does not review the merits of the prior related representation case in order to determine simply whether the decision there was correct, and, in the resulting unfair labor practice case declines all review. Thus, the "rule against relitigation" is in irrevocable conflict with Section 10(c) and the Congressional design.

B. The Effect of This Court's Decision in *Pittsburgh Plate Glass Co. v. NLRB*.

Support for the Board's "rule against litigation" derives not from the statute itself nor from persuasive legislative history, as has been shown, but it is said to result from this Court's decision in *Pittsburgh Plate Glass Co.*

v. *NLRB*, 313 U. S. 146, 157-162 (1941). Analysis of that decision reveals such a reliance to be misplaced. The central issue in that case concerned the Board's determination of "appropriate unit" which had been fully litigated in a prior representation case and which the Board declined to relitigate in a subsequent related unfair labor practice proceeding. Although this Court approved the Board's conduct in that case, its decision does not constitute governing authority here for three independent reasons. *First*, in *Pittsburgh Plate Glass* the Board had itself reviewed the evidence in the representation case so that the aggrieved party there could not allege the Board's failure to render an independent judgment on the merits of the issues in dispute:

"Each of the points was fully covered by the evidence before the Board on the unit hearing, with the result that the Crystal City Union received a full and complete hearing on every proposition . . . If the Company or the Crystal City Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue was enough."

Second, at the time that *Pittsburgh Plate Glass* was decided, Congress had not yet amended Section 3(b) so that the Board had not promulgated the limited certiorari-type review of representation cases which, together with the "rule against relitigation", allegedly authorizes the Board to decline any review whatever of the merits of issues governing related unfair labor practice cases. And *third*, at the time *Pittsburgh Plate Glass* was decided, Congress had not yet enacted the APA which guarantees precisely those procedural safeguards which the application of the "rule against relitigation" eliminates.

Accordingly, reliance upon *Pittsburgh Plate Glass* in this case is inappropriate.

C. The Policy Considerations Purportedly Favoring the "Rule Against Relitigation."

The "rule against relitigation" appears to be designed to achieve two basic purposes. The vice of the rule consists, apart from the other considerations raised *infra*, that the first of these purposes can be accomplished without the rule and the relative cost of achieving the second is too great in consideration of the requirements of procedural fairness. These purposes are:

1. To discourage an employer's holding back evidence bearing on the issue of representation, thereby forcing the Board to make its initial determinations in the representation proceeding on an incomplete record, and thus increasing the risk that this determination will be erroneous, necessitating another election with an attendant waste of both administrative and judicial effort; and
2. To alleviate delay, in recognition of the fact that delay in the selection of a bargaining representative, which would inhere in a rule allowing relitigation, could constitute a barrier to accomplishing the purpose of the National Labor Relations Act "to facilitate industrial peace through encouragement of collective bargaining".

The first of these purposes would be served by limiting the record for the Board's review under Section 10(c) to that which is made in the prior representation case. The Board would be required to accord plenary *de novo* review but, absent special circumstances, no additional evidence would be taken in the subsequent complaint proceeding.

With respect to the second purpose of the rule, such increased expedition of the Board's processes as would result do not justify the loss of the procedural safeguards which would follow, particularly since the compromise mentioned above would achieve a substantial expedition of

the Board's processes without loss of a meaningful right to obtain independent review by the Board.

"Congress has determined that the price of greater fairness is not too high." (*Wong Yang Sung v. McGrath*, 339 U. S. 33, 46-7 (1950)).

CONCLUSION.

For the foregoing reasons, and those set forth by the petitioners, the decision of the court below should be reversed; the application by the Board of the "rule against relitigation" should be declared impermissible and the Board should be instructed to honor the requirements of Section 10(c) of the Act in all unfair labor practice proceedings.

Respectfully submitted,

JERRY KRONENBERG,
BOROVSKY, EHRLICH & KRONENBERG,
111 West Washington Street,
Chicago, Illinois 60602,
*Attorney for Terminal Freight
Cooperative Association.*

Of Counsel:

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006

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Supreme Court of the United States

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*ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

BERNARD KLEIMAN

10 South LaSalle Street
Chicago, Illinois 60603

ELLIOT BREDHOFF

MICHAEL H. GOTTESMAN

GEORGE H. COHEN

BREDHOFF, BARR, GOTTESMAN,
COHEN, AND PEER

1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

WARREN PYLE

44 School Street

Boston, Massachusetts

*Attorneys for United Steelworkers
of America, AFL-CIO*

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BRIEF FOR UNITED STEELWORKERS OF
AMERICA, AFL-CIO

Amid the technicalities and complexities of comprehensive briefs and reply briefs, and the profound erudition of fine legal points, there lurks a danger that the interests of the affected employees—those for whom the NLRB was enacted—may be overlooked. Regrettably, as we show below, petitioner, Magnesium Casting Company,¹ has effectively undermined the Act's purposes by interminably delaying its obligation to bargain with the representative chosen by its employees. It now challenges procedures adopted by the Board to minimize that delay.

On March 14, 1968, United Steelworkers of America, AFL-CIO,² filed a representation petition invoking the or-

¹ Hereinafter, "the Company."

² Hereinafter, "Steelworkers" or "the Union."

derly processes of the NLRB to establish its majority status in a unit of the Company's production and maintenance employees (App. 1). After a full scale evidentiary hearing upon due notice to all parties, the Regional Director, on May 22, 1968, issued a Decision and Direction of Election which, *inter alia*, rejected the Company's claim that three assistant foremen should be excluded from the unit because of their alleged "supervisory" status (App. 110-117). Thereafter, the Company filed a comprehensive Request for Review attacking the Director's Decision on the status of the three assistant foremen. The Request was denied by the Board on June 18, 1968, on the ground that it did not raise any substantial issue warranting review (App. 127).

A secret ballot election was conducted on June 21, 1968, in accordance with the Board's usual procedures and safeguards. The Steelworkers won the election decisively: the tally of ballots showed that of approximately 205 employees eligible to vote, 140 voted for the Steelworkers and only 59 voted against (App. 131).

Incredible though it may seem in light of the Union's 81 vote margin of victory, the Company has succeeded in denying all employees the benefits of collective bargaining for two and one-half years on grounds that, even if it were to prevail, would affect only the status of the three assistant foremen. This is an intolerable state of affairs which completely undermines the basic policy of the Act to encourage the practice and procedure of collective bargaining. See Sec. 1, National Labor Relations Act, 29 U.S.C. § 141.

The limited purpose of this brief is to emphasize the urgent need for expedition in the resolution of representation issues by all reasonable measures, including the technique employed by the Board here: granting summary judgment where the employer's refusal to bargain is designed merely to test the validity of a prior adverse determination in the representation proceeding which was made by the Regional Director and which the Board found did not warrant fur-

ther review. We leave to the brief of the Board the task of supporting what the court below articulated with compelling force: that the Board did not violate either Section 10(c) of the Act or the Administrative Procedure Act by employing summary judgment here.

The Steelworkers' interest, and indeed that of all labor organizations, in wishing to achieve quicker resolution of refusal to bargain cases needs little elaboration. Steelworkers presently represents approximately one and 1/4 million employees in a number of industries, including steel, aluminum, can, copper, and metal fabricating. Its essential function is to organize production and maintenance employees and office and technical employees for the purpose of collective bargaining. To this end, it files hundreds of representation petitions annually, seeking recognition as exclusive bargaining agent in units embracing tens of thousands of workers.

The one major draw-back to invoking the Board's orderly secret ballot election procedure has been and remains today, the lack of expedition in obtaining a legally enforceable bargaining order. By delegating its function in representation cases to its Regional Directors, pursuant to Section 3 (b) of the Act as amended in 1959, the Board has reduced substantially the delay in the *initial stages* of the proceeding—*i.e.*, from date of filing of petitions up to and including holding hearings on such petitions, issuing decisions and thereafter conducting elections.³ The rub comes, however, when a majority of the employees has voted for union representation and the employer chooses not to honor the electorate's wishes.

There is no legally enforceable obligation on any such recalcitrant employer to recognize the results of the secret ballot election. Rather, an employer has the option merely

³ From 1960 to 1969 the Board cut the median time lag from filing of petition to decision and/or direction of election from 78 days to 45 days. (Data obtained from NLRB Division of Administration.)

of refusing to bargain with the union. At that juncture, the union's only legal recourse is to file an unfair labor practice charge and thereby set in motion a lengthy sequence of proceedings which virtually guarantees the employer, at the very least, a two year period of immunity from collective bargaining during which employees are denied the benefits of bargaining.⁴

The general course of an unfair labor practice case is as follows:

After an unfair labor practice charge is filed, the Regional Director orders an investigation; if it discloses that the charge is meritorious, as here, a formal complaint is issued; the employer is then accorded the opportunity to respond in a formal answer; the case is then assigned to a Trial Examiner who schedules and conducts a full scale evidentiary hearing on the complaint; thereafter, the Examiner prepares and issues a Decision and Order in which, *inter alia*, he makes findings of fact, conclusions of law, and recommends a remedial order, if necessary. The employer can continue to refuse to bargain even if the Examiner rules that it is violating the Act; thus, the employer may file exceptions and a supporting brief to the Board; in turn, the Board will then review such exceptions, brief, and the cited portions of the transcript of testimony before the Trial Examiner; and after said review the Board will prepare and issue its own Decision and Order. Once again, even if the Board finds a violation, the employer can continue to refuse to bargain, for the Board's orders are not self-enforcing. The case must

⁴ For purposes of this portion of our brief we assume *arguendo* that the Board will continue to follow its current practice of not seeking injunctive relief under Section 10(j) of the Act, 29 U.S.C. § 160(j), in cases where an employer refuses to bargain with the Union to test the propriety of an appropriate unit determination made in a prior representation proceeding. It is our understanding that the Board has deviated from this practice so infrequently to date as to be *de minimis*.

still go to a Court of Appeals where more time is consumed with briefs, reply briefs, oral argument, and finally the preparation and issuance of the Court's opinion.

In sum, then, the customary elapsed time from the date that the Union achieves an election victory until the employer *must* bargain—or face the prospect of a contempt citation—is approximately 2-3 years.⁵ This result is all the more shocking because so few refusal to bargain cases present close questions. Ross, *The Labor Law in Action; An Analysis of the Administrative Process Under the Taft-Hartley Act*, at p. 99 (1966).

Aside from the fact that this delay is totally unsatisfactory purely from the standpoint of an effective system of administering the Act, it produces unconscionable results. The employer derives economic benefits from its own wrongdoing by escaping, for an extended period of time, any obligation to bargain collectively. Conversely, the employees are deprived of the fruits of collective bargaining—the precise purpose for which they designated the union to serve as their exclusive representative. Quite naturally, in the process the employees become frustrated, demoralized and disappointed with the helplessness of their plight; become convinced that a union cannot serve their needs; and lose all respect for the Board's processes. The union's support necessarily dwindles with the passage of time and even if it could afford to expend the money and provide the staff required to keep its organizing campaigns active and func-

⁵ The median time consumed between the filing of an unfair labor practice charge and the issuance of a Board decision is over 300 days (in fiscal year 1969 it was 324 days). The median time between issuance of the Board decision and the issuance of a court of appeals decree is approximately 550 days. (Data obtained from NLRB Division of Administration.) Thus, the median time consumed between the filing of the charge and the issuance of a court of appeals decree is well over two years. Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 611, n. 30 (1969).

tioning during this lengthy 2-3 year period—which few, if any, unions can—the result inevitably is that when the employer is finally ordered by the court to bargain the union's bargaining power is at a low ebb.

The consequences of delay were aptly described in a 1960 report to the Senate Labor and Public Welfare Committee by a tripartite advisory panel headed by Archibald Cox:

“In labor-management relations justice delayed is often justice denied. A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for Government intervention.”⁶

Precisely because of the foregoing, the Steelworkers, as well as other unions, have recently urged the Board to take more affirmative measures against employers in refusal to bargain cases. Specifically, the unions have urged the Board to take the profit out of delay, by ordering employers to compensate their employees for the loss of earnings reasonably attributable to the post-election period in which the employer's actions foreclosed collective bargaining. In our judgment, this kind of a remedy would have constituted a giant step in the direction of eliminating so-called “technical” 8(a)(5) violations where, as here, the employer opts to test the validity of an adverse ruling in a representation proceeding by subsequently refusing to bargain with the union. Unfortunately, however, in *Ex-Cell-O Corp.*, 185 NLRB, No. 20, 74 LRRM 1740 (Aug. 25, 1970) the Board decided by a 3-2 vote that it lacks statutory authority to issue an order compensating employees who have been unlawfully denied the fruits of collective bargaining.⁷

⁶ Organization and Procedure of the National Labor Relations Board, Report to Senate Committee on Labor and Public Welfare, Senate Document No. 81, 86th Cong. 2d Sess., 1-2 (1960).

⁷ The Court of Appeals for the District of Columbia Circuit has on two recent occasions expressed its view that the Board *does* have authority to provide such a remedy, and has expressly disapproved *Ex-*

The summary judgment procedure utilized by the Board in this case is another, albeit much less effective, response to unconscionable delay. It will not deter delay, nor will it compensate the victims thereof, but at least it will *reduce* delay. It is designed to produce some modicum of expedition at the unfair labor practice stage by eliminating the necessity for an evidentiary hearing before a Trial Examiner where, as here:

- (1) the employer's defense to a refusal to bargain charge is that the Board made an inappropriate unit determination;
- (2) the employer received a full opportunity to present testimony, witnesses, and documentary evidence in support of its unit position in the representation hearing; and
- (3) in the interim, the employer has not come forward with any newly discovered evidence.

Under the summary judgment procedure as applied here, the employer's right to due process is protected (*i.e.*, by affording the opportunity to present newly discovered evidence) without sacrificing the employees' justifiable interest in obtaining a prompt order compelling collective bargaining. Stated otherwise, absent a showing by the employer of newly discovered evidence, "due process" does not require another hearing.

The efforts of the trade union movement to counteract interminable delay suffered a serious setback in *Ex-Cell-O*.⁸ Now the Company would have this Court completely frustrate the Congressional desire for expeditious resolution of

Cell-O. Southwest Regional Joint Board v. NLRB, No. 22,081 (D.C. Cir., Dec. 15, 1970) (slip. opin. p. 15); *International Union of Electrical Workers v. NLRB*, 426 F. 2d 1243 (D.C. Cir. 1970), cert. denied, 39 U.S. L. Week 3243 (Dec. 7, 1970).

⁸ *Ex-Cell-O* is currently pending before the Court of Appeals for the District of Columbia Circuit on a petition for review.

representation issues by deleting from the Board's arsenal even so modest a procedural weapon as summary judgment. We think it would be anomalous indeed to accept the Company's argument that by amending Section 3(b) of the Act Congress expressed *only* a desire to expedite the resolution of representation issues where consenting employers were involved, but that this legislative objective was not applicable when an employer elected instead to refuse to bargain following the union's certification.

CONCLUSION

For the foregoing reasons, Steelworkers respectfully requests that the Court affirm the decision of the court below.

Respectfully submitted,

BERNARD KLEIMAN

10 South LaSalle Street

Chicago, Illinois 60603

Bernard Kleiman
ELLIOT BREDOFF

MICHAEL H. GOTTESMAN

GEORGE H. COHEN

BREDOFF, BARR, GOTTESMAN,
COHEN, AND PEER

1000 Connecticut Avenue, N.W.

Washington, D. C. 20036

George H. Cohen
WARREN PYLE

44 School Street

Boston, Massachusetts

*Attorneys for United Steelworkers
of America, AFL-CIO*

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BRIEF FOR INTERNATIONAL UNION, U. A. W.
AS AMICUS CURIAE

BENJAMIN RUBENSTEIN

Attorney for *Amicus Curiae*

International Union, U. A. W.

2 Penn Plaza

New York City, New York 10001

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INDEX

	PAGE
Statement of Interest	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
 ARGUMENTS:	
I—Section 3(b) of the Act does not require the Board to grant review of Regional Director's decisions in representation cases	6
II—The National Labor Relations Board did not violate Section 10(c) of the Act	11
III—The National Labor Relations Board did not violate the provisions of the Administrative Procedure Act	13
IV—The Trial Examiner did not err in refusing to relitigate the issues in the representation proceeding	14
V—There is no real dispute between the circuits on interpretation of Section 3(b) or Section 10(c) of the Act	15
CONCLUSION	17

Cases Cited

Universal Camera Corp. v. NLRB, 340 U.S. 474 ..	4
N. L. R. B. v. Universal Camera Corp., 179 F. 2d 749 ..	5
N. L. R. B. v. Pittsburgh Steamship Co., 340 U.S. 498 ..	6

	PAGE
N. L. R. B. v. Olson Bodies, Inc., 420 F. 2d 1187	2
N. L. R. B. v. Clement-Blythe Company, 415 F. 2d 78	15

Statutes Cited

NATIONAL LABOR RELATIONS ACT, as amended:

61 Stat. 136; 73 Stat. 519	2
29 U.S.C. 151 et seq.	2
Section 8(a)5	3
Section 3(b)	3, 4, 6
Section 9(e)	3, 4
Section 9(e)	4
Section 10(e)	2, 3, 4
Section 10(e)	5

ADMINISTRATIVE PROCEDURE ACT:

60 Stat. 257; 80 Stat. 381	2
81 Stat. 54; U.S.C. 551 et seq.	2

RULES AND REGULATIONS OF N.L.R.B., SERIES 8, as
amended:

Section 102.67(b)	8
Section 102.67(c)	8
Section 102.67(d)	9
Section 102.67(e)	9

IN THE
Supreme Court of the United States
October Term, 1970
No. 370

MAGNESIUM CASTING COMPANY,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR INTERNATIONAL UNION, U. A. W.
AS *AMICUS CURIAE*

Statement of Interest

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), hereinafter referred to as the Union, or U.A.W., hereby respectfully submits this brief as *Amicus Curiae* * in opposition to the appeal of the petitioner from the decision of the Circuit Court of Appeals. The Union submits this brief in view of the fact that the question involved is of great importance to the future functioning of the National Labor Relations Board and the proper administration of the National Labor Relations Act. It is also of importance to the Union as such.

* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42(2).

The Union is Intervenor in *N.L.R.B. v. Olson Bodies, Inc.*, 420 F. 2nd 1187 (2d Cir. 1970), petition for cert. filed, No. 238, October 1970. The basic issues in case No. 238 and the case at bar are similar and the decision in the instant case may have a bearing on the *Olson Bodies* case. The Union is thus vitally interested in the outcome of the case at bar.

Questions Presented

Is the National Labor Relations Board bound to grant a review of a decision of its Regional Director in connection with a representation hearing before it issues a complaint or finding of violation of Section 8(a)(5) of the National Labor Relations Act, as amended?

Statutes Involved

The statutes involved are the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), hereinafter referred to as the Act, and the Administrative Procedure Act as amended (60 Stat. 257, 80 Stat. 381, 81 Stat. 54, 5 U.S.C. 551 *et seq.*).

Statement of the Case

The petitioner herein seeks to reverse a decision of the first circuit court granting enforcement of an order issued by the National Labor Relations Board, on the ground that the Board failed to grant a review of the Regional Director's decision in a representation case in which certain determinations were made with reference to the bargaining unit. The petitioner contends that pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board was bound to review the decisions of the Regional

Director in a representation case, before it issued a finding involving violation of Section 8(a)(5) (Refusal to bargain).

In issue are interpretations of Section 3(b) and 10(c) of the Act.*

Section 3(b) of the National Labor Relations Act, as amended, provides that "[T]he Board is also authorized to delegate to its regional directors its powers of Section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election to take a secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of the regional director delegated to him under this paragraph . . .".

Section 10(c) of the National Labor Relations Act as amended, upon which the petitioner herein bases the thrust of his arguments entitled, "Reduction of Testimony to Writing; Findings and Orders of Board", provides: "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order. . . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be shall issue and cause it to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no excep-

* The National Labor Relations Act will be referred to at times as the Act.

tions are filed within twenty days after services thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

Section 3(b) deals with delegation of powers to Regional Directors under Section 9(c) or (e) of the Act (Representation proceedings).

Section 10(c) deals with the method of taking testimony and filing reports as well as the power of the Board to dismiss a complaint after a report was submitted by a Trial Examiner or a member of the Board.

ARGUMENTS

It is respectfully submitted that neither Section 3(b) or Section 10(c) provide that the Board *must* grant a review of any decision of its Regional Director in a representation case.

On the contrary, under Section 3(b) the Board "may" grant review. This specifically implies that it is discretionary with the Board, whether or not to grant a review of a decision of the Regional Directors dealing with a question of representation. Nor is there any provision in Section 10(c) providing that no finding shall be made unless a review of the Regional Director's decision is made by the Board.

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) does not hold that "under Section 10(c) of the Act, the Board must make the ultimate decision whether or not an unfair labor practice has been committed, and it must state its findings of fact before issuing an order to remedy any unfair labor practices it may find", as the petitioner herein seeks to interpret said decision (Brief of Petitioner, p. 8).

In that case, the Board reversed the findings and recommendations of a Trial Examiner. On a petition by the Board to the Circuit Court of Appeals, the Court granted enforcement. The Court in *N. L. R. B. v. Universal Camera Corp.*, 179 F. 2d 749 was faced with the problem of choosing between two different decisions: that of the Trial Examiner and that of the Board. The question of the duty of the Board to grant a review of a decision of a Regional Director, was not before the Court.

In that case, the Board reversed its Trial Examiner, and substituted its own judgment for that of the examiner. The Court merely analyzed the phrase "if supported by substantial evidence on the record as a whole" (Section 10(e) of the Act), and arrived at a conclusion that although the Court, on the basis of the evidence before the Trial Examiner might have arrived at a different conclusion, to wit, sustaining the Trial Examiner, it felt that it was, nevertheless, its duty to sustain the Board's order.

The Supreme Court (340 U.S. 474), remanding the case to the Circuit Court, compared the amended provisions of the National Labor Relations Act to those of the Administrative Procedure Act, and the phrase "substantial evidence on the record considered as a whole", contained in Section 10(e) of the Act, and reached the conclusion, that: (1) there is no basic difference between the Administrative Procedure Act and the Administrative provisions of the National Labor Relations Act, and held that the Court below erred in considering only the decision of the Board and not the "record as a whole" which included the Trial Examiner's Report and Recommendations.

The question of whether the Board must grant a review of a Regional Director's determination in a representation case before issuing findings of fact in an unfair labor practice charge was not before the Circuit Court nor the Supreme Court.

Nor was this issue presented in the case of *N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U.S. 498 decided simultaneously with the *Universal Camera* case.

I. Section 3(b) of the Act does not require the Board to grant review of Regional Director's decisions in representation cases.

Section 3 deals with the creation and function of the National Labor Relations Board. Prior to the amendments of 1947 (Taft-Hartley Act) subsection (b) merely referred to activities of the Board in the event of a vacancy. It read:

“(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.”

Prior to the 1947 amendments the Board consisted of three members. Two members constituted a quorum.

In 1947 subsection (b) was amended to include a sentence reading:

“The Board is authorized to delegate to any group of three or more members any or all the powers which it may itself exercise.”

The quorum requirement was changed from two to three members.

One of the reasons for the change was, undoubtedly, the fact that between 1935, the date of the original passage, of the Act and 1947, the importance and duties of the Board grew in stature, which dictated an increase in its composition.

In 1959 subsection (b) was further amended to authorize the Board to delegate *its powers* under Section 9 to its

regional directors, with the provision that the Board *may* review any action of a regional director, "upon the filing of a request therefor . . . by any interested person . . . but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director".

The amendments of 1947 and those of 1959 sought to alleviate the problem of growth of cases handled by the Board. It gave the additional power to the Board to delegate to its subordinate agencies (the Regional Directors) part of its duties and functions provided for in Section 9(b) of the Act. Thus, the Board was authorized "to delegate to its Regional Directors its powers under Section 9 to determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, . . . and to direct an election or take a secret ballot and certify the results thereof . . ."

It is obvious from a reading of the statute that Congress intended to confer on the Board the right to delegate its full authority under Section 9 to its Regional Directors. The Regional Directors, upon such delegation of authority assumed, for all intents and purposes, except for the power of review reserved to the Board, the locus of the Board itself. Pursuant to the provisions of Section 3(b) the findings and decisions of the Regional Directors affecting Section 9 of the Act are of the same stature and validity as those of the Board itself. If a claim can be made that decisions of Regional Directors *must* be reviewed by the Board itself, such claim could also be made that a decision by any panel of the Board must also be reviewed by the Board *on banc*. Such a contention would be contrary to the purposes of the act, for each decision of a Regional Director or a Board panel would ultimately have to be heard by the Board, and the Board would become hopelessly bogged down with reviews of Regional Directors' decision, while Regional Directors and panels

would be converted into mere hearing officers without any authority to "determine" anything.

It was precisely for the above reason that Congress made the question of review discretionary with the Board; the Board *may or may not* review any action of a Regional Director at its discretion.

That Congress intended to give the delegated agents, of the Board (Regional Directors) full authority to act is further demonstrated by the provision in Section 3(b) that the granting of a review by the Board "*shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the Regional Director.*" (emphasis supplied). Had Congress intended to provide for reviews or to limit the authority of Regional Directors to make decisions in 9(c) cases it would not have included the above provision.

Had Congress intended to have the Board review decisions of the Regional Directors affecting proceedings under Section 9, it would have used "shall" or "must" instead of "may". The choice of the word "may" makes the provision very clear and distinct, and it cannot be interpreted as "shall" or "must".

The Board in construing the review provisions of Section 3(b) laid down certain guidelines for granting a request for review. Section 102.67, Rules and Regulations, Series 8, as amended, provides:

"(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final. . . .

"(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

"(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

"(d) Any request for review must be a self contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds when appropriate, said request must contain a summary of all evidence or rulings bearing on the issue together with page citations from the transcript and a summary of argument."

"(f) [D]enial of a request for review shall constitute an affirmation of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

It is clear from the above rule and regulations, that any request for review under Section 3(b) of the Act, if made in accordance with the provisions of Section 102.67(d) of the Rules and Regulations of the Board, contains either or all of the four grounds set forth in Section 102.67(e) of the Rules and Regulations. If the request is based on ground (1) it recites the "substantial question of law or policy raised"; on ground (2) it would point out the factual issue involved and set forth a summary of the evidence and rulings inclusive of page citations; on ground

(3) it would describe the conduct of the hearing and prejudicial errors in rulings; and on ground (4) it would set forth the compelling reasons for a change of Board policy.

The Board, unless derelict in its duties and performance, would, before denying a request for review first check whether it is based on any of its guidelines. It would then review the "contents" of the request: if under rule (1), whether it involves a substantial question of law or policy; if under (2), the Board would check those parts of the record and evidence referred to in the request, etc., etc.

Thus in any request for review the Board in actuality does review the pertinent ground before it denies the request.

The Court below was therefore correct in stating, that "the Board did review the evidence as summarized by the Company in its Request for Review, 29 C.F.R. #102.67(d)" in discussing the argument that the Board never reviewed the actual evidentiary record in the case.

There is no requirement in the statutes or rules that the Board must make and issue its own findings in a request for review. Its denial of a request for review on the ground, that it does not raise "substantial issues" is another way of stating that the Board considered the request and sustains the Regional Director.

There remains therefore the sole question whether, in view of the above the Board, after issuance of a complaint in an unfair labor practice, is nevertheless required to relitigate the issues previously determined by it in the representation proceeding.

The petitioner herein, in posing the "Question Presented" misrepresents the provision of Section 10(c) of the Act by assuming that it "requires that the Board itself must determine if a party has committed an unfair labor practice" (Petition for writ of certiorari, p. 2).

The reference in Section 10(c) to the Board's stating its findings of fact and issuance of an order must be read, and can be understood only when read, in relation to the other provisions affecting the Board's duties and powers: (Sect. 3(b), Section 10(b) and Section 10(c)). Surely Congress did not intend that each and every case must be reviewed *de novo* by the Board, after it was heard by a Trial Examiner or a panel of the Board. What it does mean, and intends to, is that findings and orders are issued in the name of the Board, but it does not preclude the Board from adopting the Findings and Recommendations of the agents and making them its own. Any other interpretation would obviate the right of the Board to delegate its authority either to Trial Examiners, panels, or Regional Directors.

II. The National Labor Relations Board did not violate Section 10(c) of the Act.

Section 10 as a whole deals with prevention of unfair labor practices. Subsection (a) describes the powers of the Board; subsection (b) sets down the procedure for the issuance of complaints, hearings, etc.; subsection (c) directs the reduction of testimony to writing and the issuance of findings and orders of the Board. The above and the remaining subsections of Section 10 all refer to the same issue: "prevention of unfair labor practices" and must be read and interpreted as part of a whole, not dissected into separate words and phrases.

Thus, Section 10(b) provides for hearings to be held before the Board or "any agent designated by the Board." Subsection (c) provides that the testimony taken by such agent "shall be reduced to writing and filed with the Board." In its discretion the Board *may* take further testimony or hear argument. "If upon the preponderance of the testimony taken the Board shall be of the opinion" that an unfair labor practice has been committed, "then

the Board shall state its findings of fact" and shall issue an order. The statute further provides that if the evidence was presented before an agent of the Board, he shall issue and cause to be served on the parties a proposed report together with a recommended order, "and if no exceptions are filed . . . after service thereof upon such parties, . . . such recommended order shall become the order of the Board and become effective as therein prescribed."

The section is clear in its phraseology and intent. The Board is not required to review each and every finding of its trial examiner. In fact, unless exceptions are filed within the prescribed time, the findings and recommendations of a trial examiner "become the order of the Board." If exceptions are filed the Board "in its discretion . . . may have public testimony or hear argument." It may also decide on the exceptions by merely reviewing the record without further testimony or argument. There is no requirement in the statute that the Board "*must* state its findings of fact before issuing an order." When no exceptions are filed, the Trial Examiner's findings of fact and recommended order automatically become Finding of Fact and Order of the Board. In numerous cases, even if exceptions are filed, the Board, unless it modifies the finding and recommended order of the Trial Examiner, simply adopts the findings and recommendations of the Trial Examiner without stating its own findings. This is exactly what happened in the instant case.

The Board has not violated the provisions of Section 10(c) of the Act.

III. The National Labor Relations Board did not violate the provisions of the Administrative Procedure Act.

This Court, in *Universal Camera Corp. v. N.L.R.B.* (*supra*) and in numerous other cases held that the provisions of the Administrative Procedure Act and those of the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision are identical in aim.

As Justice Frankfurter said:

“It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act.”

As mentioned *supra* there was a disagreement between the Board and the Trial Examiner. The Court in construing the phrase “substantial evidence on the record considered as a whole” (Section 10(e) of the Act), said:

“The ‘substantial evidence’ standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion.”

In the instant case there was no disagreement between the Trial Examiner and the Board. Nor was there any disagreement between the Regional Director and the Board in the representation hearing. The Board under the provision of Section 3(b) adopted the decision of the Regional Director as its own. It denied the request of the petition for review. The Trial Examiner in deciding the case took judicial notice of the prior proceeding and decision of the Board in the representation hearing. The decision and recommendation of the Trial Examiner were affirmed by

the Board. The decision of the Board was made on the record as a whole.

The case before the Circuit Court did contain the record of the case as a whole. In fact, the court reviewed, in its decision, the evidence relating to the three men in issue and concluded "that the Regional Director's determination with regard to these three men is supported by substantial evidence".

"Since all three disputed workers are employees and thus were properly included in the bargaining unit, the Board's order is supported by substantial evidence . . ."

* * *

"In the case presently before us, the Regional Director's findings of fact which had been adopted by the Trial Examiner and by the Board were as complete and 'reviewable' as any we have received from the Board."

Thus, the court below reviewed the record as a whole including the findings of the Regional Director, the Trial Examiner and that of the Board, as provided for in Section 10(e) of the Act.

IV. The Trial Examiner did not err in refusing to relitigate the issues in the representation proceeding.

Section 102.67(f) of the Rules and Regulations of the National Labor Relations Board, Section 8, as amended, provides in part:

"Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

In the instant case the issue involved was the finding of the regional director in the representation proceeding that certain assistant foremen be included in the unit. The petitioner, in its request for review, filed a "self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record" (Petitioner's brief, p. 8). Based on the contents of the "self-contained" document submitted by the petitioner, the Board "without the necessity of recourse to the record" decided that the request raised "no substantial issues warranting review." Its decision was an affirmation by the Board of the regional director's action, and the issue could not be relitigated in the subsequent unfair labor practice proceeding.

The mere fact that the decision of the Board in affirming the action of the regional director is "incomprehensible" to the petitioner was not sufficient reason for the Circuit Court to reverse the Board's findings and Order, nor is it sufficient reason for this Court to reverse the decision of the lower Court and the Board.

V. There is no real dispute between the circuits on interpretation of Section 3(b) or Section 10(c) of the Act.

The cases relied upon by the petitioner, to wit: *Pepsi-Cola Bottling Corp. v. N.L.R.B.*, 409 F. 2d 676, cert. denied, 396 U.S. 904 (1969) and *N.L.R.B. v. Clement-Blythe Companies*, 415 F. 2d 78, do not sustain the contention of the petitioner that the Board may not find a refusal to bargain where it denied the company's request for review of the Regional Director's unit determination. In the first case the Circuit Court remanded the matter to the Board for further evidence on the important question of unit determination. The decision was based on the extent of the evidence to support the findings of the Regional Director as adopted by the Board. In the second case the Court

remanded the case to the Board, for the reason that the Board failed to explain why it reached its decision on the question of timeliness of the election. Had the Regional Director set forth reasons in his decision, the Court would not have remanded the case on the grounds that it did, for the explanation of the Regional Director would have become the explanation of the Board. In fact the Circuit Court was careful to disassociate itself from the notion that the remand was caused by the Board's denial of the request for review by the company. In footnote 6, the Court said:

"We do not reach the question of whether the Board could discharge its duty by adopting the reasons supplied by the Regional Director. *In this case the Regional Director gave no reasons.* The crux of his opinion is the conclusory statement that Clement-Blythe's operations are 'sufficiently established and stabilized and that they are manned by a substantial and representative segment of the Employer's ultimate working complement'."

It is, respectfully, submitted that had the Board granted the request for review and fully reviewed the entire record and come to the same conclusion without an explanation of its decision, the Court would still remand it for the same reasons.

In the instant case as well as in *Olson Bodies* (*supra*) there is no such lack of explanation as found in the *Clement-Blythe* case nor a lack of evidence as found in the *Pepsi-Cola* case. In the instant case the Regional Director heard the testimony as to whether or not the three employees are part of the bargaining unit. In the *Olson Bodies* case the company submitted numerous affidavits to the Regional Director upon the basis of which affidavits the Regional Director made an extensive and thorough finding of facts and conclusions of law.

CONCLUSION

The finding of the Court below "that the procedure followed by the Board in this case satisfied the requirements of the National Labor Relations Act, the Administration Procedure Act, and the demands of procedural fairness", should be affirmed.

Respectfully submitted,

BENJAMIN RUBENSTEIN
Attorney for Amicus Curiae
International Union, U. A. W.

New York, N. Y.,
December, 1970.

INDEX

	Page
Opinions below-----	1
Jurisdiction-----	1
Statute and rules involved-----	2
Question presented-----	2
Statement-----	3
A. Introduction-----	3
B. The representation proceeding-----	4
C. The unfair labor practice proceeding-----	10
D. The court of appeals decision-----	12
Summary of Argument-----	12
Argument-----	13
Introduction-----	13
I. The Board's refusal, in the absence of special circumstances, to review <i>de novo</i> in the unfair labor practice proceeding issues which it previously declined to review after determination by the regional director in the representation proceeding is sanctioned by and furthers the purpose of the 1959 amendment to section 3(b) of the Act-----	16
II. The Board's procedure provides adequate protection to the interests of respondents in Board proceedings, and such protection was fully accorded to the Company in this case-----	23
Conclusion-----	28
Appendix-----	29

CITATIONS

Cases:	
<i>Boire v. Greyhound</i> , 376 U.S. 473-----	4
<i>Excelsior Underwear, Inc.</i> , 156 NLRB 1236-----	8
<i>Hoban v. Magnesium Casting Co.</i> , 401 F. 2d 516, certiorari denied, 393 U.S. 1065-----	9-10
<i>Meyer Dairy, Inc. v. National Labor Relations Board</i> , 429 F. 2d 697-----	15

Cases—Continued

<i>National Labor Relations Board v. Bayliss Trucking Co.</i> , 75 LRRM 2501.....	16
<i>National Labor Relations Board v. Duval Jewelry Co.</i> , 357 U.S. 1.....	24-25
<i>National Labor Relations Board v. Gissel Packing Co.</i> , 395 U.S. 575.....	28
<i>National Labor Relations Board v. Lowell Corrugated Container Corp.</i> , 75 LRRM 2346.....	27
<i>National Labor Relations Board v. Olson Bodies, Inc.</i> , 420 F. 2d 1187.....	16
<i>National Labor Relations Board v. Wyman-Gordon Co.</i> , 394 U.S. 759.....	9
<i>Pepsi-Cola Bottling Co. v. National Labor Relations Board</i> , 409 F. 2d 676, certiorari denied, 396 U.S. 904.....	11, 16, 22
<i>Pittsburgh Plate Glass Co. v. National Labor Relations Board</i> , 313 U.S. 146.....	13, 16-17
<i>Wyman-Gordon Co., v. National Labor Relations Board</i> , 397 F. 2d 394.....	9
Statutes:	
<i>National Labor Relations Act</i> , as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, <i>et seq.</i>).....	29-34
Section 2(11).....	5, 29
Section 3(b).....	2-3, 12, 13, 15, 17, 18, 20, 22, 29
Section 8(a)(1).....	30
Section 8(a)(5).....	4, 10, 11, 30
Section 9a.....	30
Section 9(e)(1).....	3, 4, 17, 30-31
Section 9(d).....	27, 31
Section 10(e).....	4, 17, 32-33
Section 10(f).....	33-34
<i>Administrative Procedure Act</i> , 5 U.S.C. 557(c).....	25
NLRB Rules and Regulations and Statements of Procedure:	
29 C.F.R. 101.14.....	27
29 C.F.R. 102.45(a).....	27
29 C.F.R. 102.62(c).....	24
29 C.F.R. 102.62(d).....	24
29 C.F.R. 102.63.....	14, 34-35
29 C.F.R. 102.64.....	14, 35-36
29 C.F.R. 102.67(a).....	3, 14-15, 36

III

Statutes—Continued

NLRB Rules and Regulations and Statements of Procedure—Continued	Page
29 C.F.R. 102.67(b).....	3, 15, 26, 37
29 C.F.R. 102.67(c).....	3, 37-38
29 C.F.R. 102.67(d).....	3, 38
29 C.F.R. 102.67(e).....	38
29 C.F.R. 102.67(f).....	3, 38-39
29 C.F.R. 102.67(h).....	3, 15, 39
29 C.F.R. 102.67(j).....	39

Miscellaneous:

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (GPO, 1959).....	18
1452.....	19
1460.....	19
1722.....	19
1749-50.....	18-19
1812.....	19
1856.....	18
34th Annual Report of the National Labor Relations Board.....	20

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 200-212)¹ is reported at 427 F. 2d 114. The decision and order of the National Labor Relations Board in the unfair labor proceeding (A. 157-172, 185-186) are reported at 175 NLRB No. 68; the decisions in the related representation proceeding (A. 110-117, 131-136) are not officially reported.

JURISDICTION

The judgment of the court of appeals (A. 212) was entered on May 21, 1970. The petition for a writ of

¹ "A." refers to the joint Appendix heretofore filed with the Court. "App." refers to the Appendix at the end of this Brief. "Br." refers to petitioner's brief.

certiorari was filed on July 9, 1970, and granted on October 12, 1970 (A. 215). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth in the Appendix, *infra*, pp. 29-39.

QUESTION PRESENTED

Section 3(b) of the National Labor Relations Act permits the Board to delegate to its regional directors the authority to make representation determinations, subject to discretionary review of those determination by the Board. The question presented is whether the Board nevertheless is required to give plenary review to a regional director's determination to include particular employees in the collective bargaining unit before it can base an unfair labor practice finding upon that determination.

STATEMENT

A. INTRODUCTION

Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b) (App. *infra*, pp. 29-30), authorizes the National Labor Relations Board "to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining," as well as its other powers concerning representation issues. It further provides that,

upon request of an interested person, "the Board may review any action of a regional director delegated to him." The Board has adopted rules, based on this authority, delegating its powers to determine representation issues to its regional directors, subject to the right of a party to seek review by the Board.²

Upon the filing of a representation petition, Section 9(e)(1) of the Act (App., *infra*, pp. 30-31) provides that a hearing shall be held to determine if a question of representation exists and, if so, the appropriate bargaining unit and other election issues. On the basis of

²The rules regarding review (29 C.F.R. 102.67, App. *infra*, pp. 37-39) specify that:

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. * * *

(f) * * * Failure to request review shall preclude [the] parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

that hearing, an election may be directed; and, if a union prevails, it is certified as the employees' bargaining representative.

An employer who contests the validity of the election, including the unit determination, can obtain court review of his contentions only through an unfair labor practice proceeding under Section 10. He can refuse to bargain on the ground that the certification is invalid; if an unfair labor practice complaint issues and the Board ultimately finds that the refusal violated Section 8(a)(5) and enters an order to bargain, the employer may obtain review of that order and the underlying representation proceedings in the court of appeals, under Section 10(e) or (f) (App., *infra*, pp. 32-34). The record of the representation proceeding is before the court at that time under Section 9(d) (App., *infra*, p. 31). See *Boire v. Greyhound Corp.*, 376 U.S. 473.

B. THE REPRESENTATION PROCEEDING

On March 14, 1968, the Union³ filed a petition pursuant to Section 9(e) of the Act (App., *infra*, pp. 30-31) with the Board's regional director in Boston, requesting a representation election among the production and maintenance employees at petitioner's Hyde Park, Massachusetts plant⁴ (A. 4-5, 13). A hearing was held on the petition before a hearing officer designated by

³United Steelworkers of America, AFL-CIO. The Union intervened in the court of appeals and thus is a party here.

⁴At that plant, the Company is engaged in the manufacture and sale of various desk accessories and related products. Approximately 250 employees are included in the designated unit (A. 112).

the regional director, at which evidence was adduced, *inter alia*, concerning whether four individuals classified as "assistant foremen" were employees, and thus included in the unit, or were supervisors within the meaning of Section 2(11) of the Act (App., *infra*, p. 29), and thus excluded therefrom (A. 110, 112; 4, 14).

The evidence so adduced revealed the following: The Company's products division is divided into two sections, plating and finishing, and assembly and packaging, each of which consists of between 10 and 12 employees and is under the supervision of a foreman (A. 113-115; 16-17, 36-37). Each section is in turn divided into two smaller departments headed by the following assistant foremen: Raymond Zagrafos (metal finishing), Ivory Scott (electroplating), George Morris (one team of assembly and packaging), and Alonzo Massey (another team of assembly and packaging) (A. 16-17). These men are paid between 15 and 30 cents per hour more than the rank-and-file employees in their departments (A. 42), but 60 cents less than their respective foremen (A. 39). They attend bi-weekly "management" or "supervisory" meetings, which are also attended by all foremen in the products division, the assistant plant manager, and the assistant to the president; at these meetings, production, quality control, and personnel problems are discussed (A. 113-114; 17-18, 56, 98, 102-103).

Morris and Massey each have three or four employees working with them at any given time (A. 113;

49, 69). In addition to their regular production work, they insure that these employees are supplied with enough material to keep them busy, and inspect their work for inaccuracies, which they report to their foreman, Steinberg (A. 113; 50-51, 54, 64-65). Steinberg makes the daily work assignments (A. 113; 51, 66-67). He also checks the work of employees in the department, including that of Morris and Massey, every ten minutes during the day, and makes any necessary corrections (A. 113; 51-52, 65). Neither Morris nor Massey has ever hired, fired, or suspended an employee, or recommended any wage increases (A. 113; 51, 65).

Scott has two or three employees working with him (A. 114; 89). In addition to regular production, he engages in quality control work (A. 114; 23, 28-29), and, as a result of special training provided at Company expense, does chemical analysis for plating (A. 114; 29-30, 79). Scott testified that his foreman, Kabilian, assigns work to him and the other employees, and that the employees check with Kabilian if they are not coming to work or wish to take leave (A. 114; 81); he further testified that he had no authority to hire, fire, suspend, layoff, recall, promote, or discipline employees (A. 114; 82-83). A Company official testified, however, that Scott does have such authority, citing one incident when Scott told employee Washington, who had refused to do his job assignment and threatened to leave the plant, "if you leave don't come back," after which Washington returned to his job (A. 114-115; 17-19).

On the basis of the record developed by the hearing officer,⁵ the regional director concluded that Massey, Morris, and Scott were employees, rather than supervisors, and included them in the unit. In support of his conclusion regarding Massey and Morris, the director found that their "primary function is to keep the women supplied with work, to inspect the products and to refer any defective materials to Steinberg," who "is continually in the area and repeatedly checks the work of Massey and Morris as well as the work of the women in this department"; that they have "no authority to hire, fire, suspend, promote, transfer or discipline employees, nor do they responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department"; and that their attendance at the bi-weekly management meetings was not sufficient to make them supervisors, since the "primary function of these meetings" was "to discuss production problems" (A. 113-114). As to Scott, the director found that, while his training in electro-plating "makes him more experienced in this operation than any one else in his department," his work was "of a routine nature" and closely supervised by Foreman Kabilian; that Scott "did not have authority to hire, fire, suspend, layoff, recall, promote, discipline or otherwise engage in any course of conduct which would affect the employment status of any

⁵ Since the facts were largely undisputed, the director was not required to resolve credibility issues, contrary to petitioner's intimation (Br. 14). The director accepted petitioner's version of Scott's authority (*infra*, p. 8).

employee in his department"; and that, assuming that Scott warned an employee on one occasion, "this incident is too isolated [on which] to predicate a finding of supervisory status" (A. 114-115).⁶

On May 22, 1968, the director ordered that an election be conducted in a unit consisting of all the Company's production and maintenance employees, including Massey, Morris, and Scott (A. 116-117). The Company was also directed to furnish a list containing the names and addresses of the eligible voters, which, pursuant to the Board's decision in *Excelsior Underwear, Inc.*,⁷ would be made available to the Union (A. 117, n. 3).

The Company filed with the Board a request for review of the regional director's decision and direction of election, contending that his ruling "on the factual issue of the supervisory status of employees" Scott, Massey, and Morris "is clearly erroneous on the record and such error prejudicially affects the rights of the Employer" (A. 118). The request for review contained a detailed recital of the record evidence respecting the duties of these individuals which the Company believed supported its contentions, and a full discussion of the relevant legal authorities (A.

⁶ The fourth assistant foreman, Zagrafos, was found to be a supervisor and thus was excluded from the unit. The director relied on the fact that Zagrafos testified without contradiction that he spends 80 percent of his time doing supervisory work, effectively recommended three people for wage increases, fired another employee, grants employees time off, transfers them between departments, assigns them to jobs, and orders them to make corrections (A. 115; 96-99).

⁷ 156 NLRB 1236.

118-127). On June 18, 1968, the Board denied the Company's request for review, on the ground that it raised no substantial issues warranting review (A. 127).

The election was conducted on June 21, 1968, and resulted in 140 votes for, and 59 votes against, the Union, with 1 challenged ballot (A. 131).⁸ The Company filed an objection to the election, asserting that the *Excelsior* list requirement, with which it had complied under protest, was invalid (A. 131-133).⁹ On October 11, 1968, the director overruled the Company's objection to the election and certified the Union as the exclusive bargaining representative of the Company's employees (A. 131-136).¹⁰

⁸ Petitioner argues (Pet. 9-10) that, if the assistant foremen were "supervisors," their participation in the Union's organization drive would have been improper under established principles. It is for this reason that the Company challenged the determination of the status of the assistant foremen: since the Union won the election by a substantial margin, their individual votes were not decisive.

⁹ The Company relied on the First Circuit's decision in *Wyman-Gordon Co. v. National Labor Relations Board*, 397 F. 2d 394, holding that the Board's *Excelsior* requirement had been promulgated in violation of the Administrative Procedure Act. This decision was subsequently reversed by this Court. *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759.

¹⁰ The Company had previously obtained an injunction from the United States District Court for the District of Massachusetts, enjoining the director from certifying the results of the election pending the final disposition of the petition for a writ of certiorari which the Board had filed in *Wyman-Gordon*, n. 9, *supra*. On September 10, 1968, the First Circuit vacated the injunction on the ground that the Company, by supplying the *Excelsior* list, had waived its right to contest the validity of that requirement. *Hoban v. Magnesium Casting Co.*, 401

C. THE UNFAIR LABOR PRACTICE PROCEEDING

When the Company then refused to bargain, the Union filed an unfair labor practice charge with the Board. A complaint issued alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act (A. 138-141). In its answer the Company denied that it had refused to bargain and asserted again that Scott, Morris, and Massey were "supervisors" and that the *Excelsior* requirement was invalid (A. 145-146).

The general counsel of the Board moved for summary judgment, in response to which the Company renewed its earlier contentions and alleged that it had newly discovered evidence regarding Scott's supervisory status and his activities on behalf of the Union (A. 147-157). In support of the latter, the Company offered to show, *inter alia*, that Scott (1) "admittedly withheld information in the representation proceeding concerning his full responsibilities and authority as an assistant foreman"; (2) "had the authority to and often did independently exercise such authority to" perform certain enumerated functions evidencing supervisory status; and (3) was asked by the Union to solicit authorization cards on its behalf, which he openly did (A. 155-156).

The trial examiner granted the general counsel's motion for summary judgment (A. 157-165), noting that in the absence of newly discovered evidence or

F. 2d 516, certiorari denied, 393 U.S. 1065 (A. 128-130). The Company requested the Board to delay action on the certification pending disposition of its certiorari petition in the injunction action, which the Board refused to do (A. 136-138).

other special circumstances, established Board policy prohibited litigation in an unfair labor practice case of issues which were, or could have been, litigated in a prior representation proceeding (A. 163-164). He found that the only "newly discovered" evidence offered by the Company was its assertion that Scott admitted, after the hearing, that he had supervisory authority; and that, since no support for this assertion was furnished, it appeared the Company was merely attempting by this means to relitigate matters decided in the representation proceeding (A. 164). Finally, the examiner rejected as legally irrelevant any evidence concerning Scott's participation in the solicitation of authorization cards, since in the representation proceedings he was found to be an employee, and not a supervisor (A. 164-165).

The Company excepted to the trial examiner's findings and conclusions (A. 172-184). The Board affirmed the examiner's decision, adopted his finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and ordered the Company to bargain with the Union upon request (A. 185-186).

The Company filed a motion for reconsideration with the Board, asserting that, under the intervening decision in *Pepsi-Cola Bottling Co. v. National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, the Board must review the regional director's representation determination and decide if that determination was correct before issuing an unfair labor practice order based thereon (A. 186-190). The Board denied the Company's motion, noting

its disagreement with *Pepsi-Cola* (A. 190-191). It subsequently denied the Company's motion to reopen the record for additional evidence concerning the turnover of employees and the expansion of the unit (A. 192-195).

D. THE COURT OF APPEALS DECISION

The court of appeals enforced the Board's order (A. 212). It ruled that substantial evidence supported the regional director's determination that Scott, Morris, and Massey were employees, rather than supervisors (A. 201-205). The court did not require plenary Board review of that determination concluding that "the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness" (A. 211).

SUMMARY OF ARGUMENT

Section 3(b) of the Act permits the Board to delegate to its regional directors its powers in representation proceedings. Pursuant to this provision, the Board has adopted rules authorizing its regional directors to make representation determinations, subject to discretionary review by the Board. Here the Board denied review of a regional director's representation determination and an unfair labor practice proceeding ensued because the Company refused to bargain. The question is whether in the unfair labor practice proceeding the Board may, absent special circumstances not here present, properly adopt the regional director's determination without further review.

The court below correctly concluded that the Board need not review the regional director's determination *de novo* in the unfair labor practice proceeding. Both the language and the legislative history of Section 3(b) indicate that Congress intended to vest regional directors with final authority over representation proceedings, subject only to discretionary review by the Board. The fundamental congressional objective in doing so was to expedite the handling of election cases. This objective would be substantially frustrated if the Board were required to give plenary consideration to a representation determination before that determination could be adopted in a related unfair labor practice proceeding.

The procedure approved by the court below affords ample opportunity for the Board to determine the validity of the regional director's representation determination. Moreover, the court of appeals carefully reviewed the findings of the regional director and the Board, and concluded that they were supported by substantial evidence.

ARGUMENT

Since early Wagner Act days, it has been established that, absent newly discovered evidence or other exceptional circumstances, the employer is not entitled to relitigate in an unfair labor practice proceeding any issues which were, or could have been, litigated and determined in an earlier related representation proceeding. As the Court explained in *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146, 158, 162, the representation and

unfair labor practice proceedings "are really one [and] a single trial of the [representation] issue [is] enough."

Until 1959, the issues in a Section 9 representation proceeding as well as those in a Section 10 unfair labor practice proceeding were determined by the Board itself. In that year Congress amended Section 3(b) (App., *infra*, pp. 29-30) to provide:

* * * The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot * * * and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph * * *.

Pursuant to this authorization, the Board has delegated its powers to determine representation issues to its regional directors. The procedures adopted by the Board provide that in such cases the regional director shall order a hearing before a hearing officer (29 C.F.R. 102.63, 102.64, App., *infra*, pp. 34-36). On the basis of the record developed at the hearing, the regional director determines "the unit appropriate for purpose of collective bargaining, [and] whether a question concerning representation exists, and * * * direct[s] an election * * * or make[s] other disposition of the matter" (29 C.F.R. 102.67(a) App., *infra*,

p. 36).¹¹ The decision of the regional director "shall set forth his findings, conclusions, and order or direction," and "shall be final" unless a request for review is filed with the Board (29 C.F.R. 102.67(b) App., *infra*, p. 37).¹²

The question in this case is whether the Board may properly apply the settled principle barring relitigation in a related unfair labor practice proceeding of issues determined in the representation proceeding where, as here, the representation determination is made by the regional director pursuant to the delegation permitted by Section 3(b) of the Act, and the Board declines review of, and thereby summarily affirms, the director's decision. The court below and the Tenth Circuit¹³ say yes; the Second Circuit, however, has required that in such circumstances the Board, "before taking the serious step of declaring that an employer has committed an unfair labor practice," must "review the record before the Regional Director to determine whether his decision was correct, and not merely

¹¹ The matter may be referred directly to the Board: "In any case in which it appears to the regional director that the proceeding raises issues which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board." 29 C.F.R. 102.67(h) (App., *infra*, p. 39).

¹² Petitioner suggests (Br. 13-14) that because the regional director does not preside at the hearing he may not be familiar with the record there developed. The pertinent rules refute this assertion: the director must base his determination on this record and specifically is required to set forth his findings and conclusions (29 C.F.R. 102.67(a), (b), App., *infra*, pp. 36-37).

¹³ *Meyer Dairy, Inc. v. National Labor Relations Board*, 429 F. 2d 697, 699-700.

whether it was clearly erroneous." *Pepsi-Cola Bottling Co. v. National Labor Relations Board*, 409 F. 2d 676, 681, certiorari denied, 396 U.S. 904.¹⁴

I. THE BOARD'S REFUSAL, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, TO REVIEW DE NOVO IN THE UNFAIR LABOR PRACTICE PROCEEDING ISSUES WHICH IT PREVIOUSLY DECLINED TO REVIEW AFTER DETERMINATION BY THE REGIONAL DIRECTOR IN THE REPRESENTATION PROCEEDING IS SANCTIONED BY AND FURTHERS THE PURPOSE OF THE 1959 AMENDMENT TO SECTION 3(b) OF THE ACT

The 1959 amendment to Section 3(b) of the Act authorizes the Board to delegate to its regional directors its powers to determine representation questions, subject only to discretionary Board review. On its face, this amendment indicates a congressional purpose to endow the regional director with all the powers which the Board previously exercised in a Section 9 proceeding, subject to such review as the Board might provide. The Board's power in a representation proceeding was to decide bargaining unit and other election issues; absent special circumstances, its decision on such issues was not subject to relitigation in subsequent unfair labor practice proceedings. *Pittsburgh*

¹⁴ In subsequent cases the Second Circuit has narrowed its decision, so that plenary Board review is required only when an issue "is difficult and requires a fine-drawn balancing of facts and law." *National Labor Relations Board v. Olson Bodies, Inc.*, 420 F. 2d 1187, 1190, petition for a writ of certiorari pending, No. 238, this Term; *National Labor Relations Board v. Bayliss Trucking Co.*, October 28, 1970, 75 LRRM 2501, 2504. In both *Olson* and *Bayliss*, the Board's order was enforced even though the Board did not give plenary consideration to the regional director's representation determination.

Plate Glass Co. v. National Labor Relations Board, *supra*.¹⁵ Since Section 3(b) places the regional director in the Board's shoes, it follows that, absent special circumstances, the Board is not required to reconsider, in the subsequent unfair labor practice proceedings, the determination of the regional director made in the representation proceedings.

The fact that the amendment refers only to Section 9 does not, as petitioner would have it (Br. 18, 24-25), prevent that amendment from having any impact on other sections of the Act. As the court below recognized, petitioner's argument "overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers, it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10," citing *Pittsburgh Plate Glass*. The court correctly added: "Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination—when not set aside by the Board—is entitled to the same weight in the subsequent [unfair labor practice] proceeding

¹⁵ Although in *Pittsburgh Plate Glass* the Board itself had ruled on the representation issue—since then the Board was not authorized to delegate such matters to its regional directors—the thrust of the Court's decision was that, because the representation issue had been fully litigated once (in the representation proceeding), further litigation on that issue (in the unfair labor practice proceeding) would only be cumulative. 313 U.S. at 162. That the Board itself ruled in the earlier representation proceeding was not essential to the Court's decision.

that the Board's own determination would have been accorded." (A. 207.)

The legislative history of Section 3(b) confirms this analysis. Senator Goldwater, a member of the House-Senate Conference Committee, stated:¹⁶

[Section 3(b)] is a new provision, not in either the House or Senate bills, *designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.*

Under this provision, the regional director can exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. In the handling of such cases, the regional directors are required to follow the lawful rules, regulations, procedures, and precedents of the Board and *to act in all respects as the Board itself would act.*

* * * * *

*This authority to delegate to the regional director is designed, as indicated, to speed the work of the Board * * *. [Emphasis added.]*¹⁷

¹⁶ II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (GPO, 1959) 1856 (hereinafter cited as "Leg. Hist.").

¹⁷ Representative Kearns further explained (II Leg. Hist. 1749-1750):

* * * The Board is authorized to delegate to its regional directors the processing of representation cases. Such cases account for more than 50 percent of the Board's workload. During the early years of the NLRA, the Board undoubtedly needed to handle these cases by itself. More than 20 years later the rules of decision are well established and nearly all of the cases are decided on established precedent. To make certain Board policy is followed by regional directors, provision is made for appeal to the Board. Action of the Director is not

The basic congressional objective was to authorize delegation of representation case powers to the regional directors, in order to expedite the handling of election cases and, by reducing the workload of the Board, of other cases as well. To achieve this objective, Congress was willing to permit the Board to give its regional directors the power "to act in all respects as the Board itself would act" and make a "final determination" of representation issues, subject to such review as the Board might provide. Congress recognized that this would vest the regional directors with important powers,¹⁸ but concluded that the overall

stayed pending the appeal, however, to avoid the taking of an appeal as a delaying technique. This change of procedure will materially decrease the time spent in processing representation cases and eliminate advantages which parties have long sought to obtain by delays. It should therefore encourage consent elections and reduce the number of formal proceedings.

Representative Udall stated (II Leg. Hist. (1722) :

* * * The conferees * * * adopted * * * provisions which will enable the NLRB to handle more cases, and to handle them more expeditiously, by decentralizing its supervision of elections.

Representative Barden added (II Leg. Hist. (1812) :

* * * [I]t is clearly intended that the regional directors in making any decisions or rulings pursuant to a delegation permitted by that section would be subject to and bound by the various precedents and rules and regulations established by the Board, and furthermore, an appeal to the Board is provided to prevent and/or remedy any abuse of discretion or departure from Board precedent or Board rules and regulations by the regional directors.

¹⁸ Indeed, for this reason, it was suggested by some legislators that the regional directors should be appointed by the President and confirmed by the Senate, as are the members of the Board. See II Leg. Hist. 1452 (Senator Dirksen), 1460 (Senator Goldwater). This suggestion was not adopted.

need to expedite case handling justified this step,¹⁹ particularly since safeguards and discretionary Board review were provided. In the words of the court below (A. 209):

[T]he section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.²⁰

¹⁹ The Board's ability to delegate its representation functions to its regional directors has significantly lightened the Board's case load. In fiscal year 1969, a total of 1,999 formal representation decisions were issued either directing elections or dismissing election petitions: 1,872 of these were rendered by regional directors, and 127 by the Board (100 on direct transfer from the regional directors for initial decision and 27 on grant of a request for review of the regional director's decision). 34th Annual Report of the National Labor Relations Board 201, Table 3B (GPO, 1970). The Board, prior to the 1959 amendment, would have decided all of these cases.

²⁰ Nor does it follow, as petitioner asserts (Br. 25-26, n. 7), that because Congress in 1961 rejected Reorganization Plan 5—which would have permitted the Board to delegate its powers in all unfair labor practice cases to its trial examiners, subject to discretionary Board review—Congress intended that representation determinations by the regional directors should be

Thus the decision of the regional director, made in the delegated exercise of the Board's "powers under Section 9 to determine" representation questions (Section 3(b)), is final (unless the Board reviews it) not only for purposes of the representation proceeding but also in a subsequent unfair labor practice proceeding in which the representation determination is challenged. This not only is a matter of logic; it also is supported by sound practical considerations.

To hold that the Board must, in those cases where it has not granted review in the representation proceeding and the issue is difficult, give plenary consideration to the record of that proceeding when the case comes before it in an unfair labor practice proceeding—as the Second Circuit has done²¹—would sub-

given plenary review by the Board at the unfair labor practice stage. There simply is no indication that in rejecting Reorganization Plan 5 Congress intended to diminish in any respect the power which it had previously conferred on the Board by Section 3(b) to delegate the determination of representation issues to its regional directors.

²¹ The recent attempts by the court to limit its *Pepsi-Cola* rule to "difficult" issues involving "a fine-drawn balancing of facts and law" (n. 14, *supra*) has no support in the legislative history of Section 3(b) or in the overall scheme of the Act. As the court below observed (A. 211):

We shrink from the prospect of attempting such characterizations; in the case before us involving the issues of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress * * *.

stantially impair the purpose Congress sought to achieve in amending Section 3(b). For it would make the regional director's decision "final" only where the representation proceeding does not culminate in unfair labor practice proceedings. If the employer refuses to bargain in order to test the director's representation determination,²² the Board would be required in the ensuing unfair labor practice proceeding to review the record *de novo* and "make its own determination as to whether the Regional Director's decision was right" (*Pepsi-Cola, supra*, 409 F. 2d at 682), even though it had satisfied itself in an appellate capacity during the representation proceeding that the regional director's decision did not warrant review.

This result would contravene the language and clear intent of Section 3(b), which provides that representation determinations by the regional directors shall be subject only to discretionary Board review. Moreover, far from expediting the disposition of cases and reducing the Board's workload, as Congress, intended, it would force the Board to look twice at each representation case which culminates in an unfair labor practice proceeding, a result Congress hardly intended.

To be sure, the Second Circuit's holding would still permit an election to be held expeditiously, since the required plenary Board review of the regional director's representation determination is deferred until

²² Potentially every representation case is in this category, since an employer can obtain judicial review of a representation determination only by triggering an unfair labor practice proceeding.

the unfair labor practice proceeding. But where the employer elects to contest a certification, no bargaining relationship—the desired end result—is established unless and until the Board has issued a bargaining order and that order is enforced by a court of appeals. By delaying the conclusion of the unfair labor practice proceeding, the Second Circuit requirement substantially dissipates the benefits derived from a prompt handling of the representation proceeding.²³

II. THE BOARD'S PROCEDURE PROVIDES ADEQUATE PROTECTION TO THE INTERESTS OF RESPONDENTS IN BOARD PROCEEDINGS, AND SUCH PROTECTION WAS FULLY ACCORDED TO THE COMPANY IN THIS CASE

The Board's procedure affords ample opportunity for the Board to determine the validity of the regional director's determination in the representation proceeding without mandatory *de novo* Board review, either in that proceeding or later. In determining whether to grant review of a representation determination, the Board has before it the regional director's decision, which includes his findings and conclusions, and the request for review. The request must contain a detailed analysis of the evidence and the legal principles and cases upon which the request-

²³ In the period January through June 1970, the median time between the filing of a representation petition and decision by the regional director was 48 days; where a decision by the Board occurred (either on direct transfer or on review), the median time was 245 days. If plenary Board review were required in all unfair labor practice cases in which the representation determination is in issue, the time added would undoubtedly exceed even the present disparity, since the Board, with a larger caseload, would take longer to reach a case.

ing party relies. 29 C.F.R. 102.62(d) (App., *infra*, p. 38). When the Board grants review it is because it has been shown that compelling reasons exist therefor—as, for instance, where the regional director's factual determinations are clearly erroneous. 29 C.F.R. 102.62(e) (App., *infra*, pp. 37-38). But where, as here, the Board—after considering the detailed request for review and the regional director's decision—concludes that the requesting party has not shown compelling reasons for Board review, it will not grant it. The Board's rules (n. 2, par. (f), p. 3, *supra*) state: "Denial of a request for review shall constitute an affirmance of the regional director's action * * *."

The court below properly observed that "[i]n effect, the procedure enables the protestant to marshal its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes." A. 210, n. 5. As the court added, in these circumstances, "[i]t is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions." A. 210.²⁴

²⁴ The Board's procedure for discretionary review of the regional director's representation determination is, contrary to the view expressed in *Pepsi-Cola* and petitioner's similar assertion (Br. 21-22), essentially equivalent to the procedure involved in *National Labor Relations Board v. Duval Jewelry Co.*, 357 U.S. 1. In *Duval Jewelry*, this Court approved the Board's action in delegating to a hearing officer its power to rule on petitions to revoke subpoenas, because the officer "does not * * * have the final word"; "[u]ltimate decision on the merits of all the issues coming before him is left to the Board." *Id.* at 8. The procedure by which the Board reserved the "final word"

The Board's procedure does not, as petitioner contends (Br. 26-29), deprive it of the right to a complete record on which to obtain judicial review of the Board's unfair labor practice order and the underlying representation certification.²⁵ The party charged in the subsequent unfair labor practice proceeding may contest before the Board issues not fully litigated in the earlier representation determination; here the Company attempted to do so, by proferring, in response to the summary judgment motion²⁶ in the subsequent proceeding, evidence which it alleged was

in *Duval Jewelry*, like the procedure here in question for review of a regional director's representation determination, gives the person aggrieved only the right to request Board review; such permission is granted only if a substantial issue is presented. In approving such procedure the Court stated (*id.* at 7):

The fact that special permission of the Board is required for the appeal is not important. Motion for leave to appeal is the method of showing that a substantial question is raised concerning the validity of the subordinate's ruling. If the Board denies leave, it has decided that no substantial question is presented * * *.

²⁵ The Administrative Procedure Act, 5 U.S.C. 557(c), on which petitioner relies, provides in relevant part: "All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, and all the material issues of fact, law, or discretion presented on the record * * *."

²⁶ Petitioner suggests (Br. 15-16) that the Board's summary judgment procedure violates the requirement for separation of Board and general counsel functions. But the general counsel determines whether to move for summary judgment on the basis of whether the complaint and answer in the unfair labor practice case show that there are no unresolved issues of fact requiring further hearing, and not on the merits of the regional director's decision. Moreover, the general counsel's summary judgment motion is decided by the trial examiner and the Board, both of which are independent of the regional director and the general counsel.

newly discovered. Only after considering fully the regional director's representation determination and the Company's objections to that determination and the purported "new evidence"²⁷ did the trial examiner, and later the Board, finally adopt the director's determination. Since the Board's unfair labor practice order was grounded on the prior representation determination, the record of that prior proceeding was included in the transcript filed in the court of appeals, and thus was before the court for its review—as Section 9(d) (App., *infra*, p. 31) expressly requires.

As the court below correctly stated (A. 210-211):

* * * [B]oth Senator Goldwater's remarks [concerning the adoption of Section 3(b), p. 18, *supra*] and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in

²⁷ The only purported newly discovered evidence was the unsupported allegation that Scott had withheld information concerning his supervisory authority during the representation proceeding. As the court below properly concluded, "because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he has not produced it at the appropriate time. The Company's first proffer merely stated that Scott had 'admittedly withheld information * * * concerning his full responsibilities and authority as an assistant foreman,' without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. * * *" (A. 205).

the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C. § [9] (d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. * * * ²⁸

Indeed, here the court carefully reviewed the representation findings of the regional director and concluded that they were supported by substantial evidence (A. 202–205).

In sum, at each stage of the proceedings here the Company has been afforded ample opportunity to present its views to the Board and the court of appeals, and those views were fully and carefully considered.

²⁸ The First Circuit's subsequent decision in *National Labor Relations Board v. Lowell Corrugated Container Corp.*, No. 7568, September 30, 1970, 75 LRRM 2346, to which petitioner directs attention (Br. 16–17), is distinguishable from the present case. There the trial examiner refused in the unfair labor practice proceeding to consider the evidence on which the regional director made his representation determination, as did the Board in affirming the examiner's ruling: unlike the present case, the Board had not previously considered the representation determination in any manner, since it had not been requested to do so. The *Lowell* court itself found, on its review of the entire record, that the director's determination was supported by substantial evidence and accordingly enforced the Board's bargaining order based thereon. Indeed, in this respect the *Lowell* decision is in complete harmony with the decision below: in the present case, the court reviewed the record of the representation proceeding and concluded that "the Regional Director's determination with regard to [the supervisor issue] is supported by substantial evidence." A. 205.

CONCLUSION

The judgment of the court of appeals enforcing the Board's order should be affirmed.²⁹

ERWIN N. GRISWOLD,
Solicitor General.

WM. TERRY BRAY,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ABIGAIL COOLEY BASKIR,
Attorney,

National Labor Relations Board.

JANUARY 1971.

²⁹ The petitioner urges (Br. 29-30) that the case should, in any event, be remanded to the Board to determine whether, in view of the lapse of time and the resultant employee turnover, a bargaining order is still appropriate. The court below properly rejected this suggestion since the delay is attributable to the Company's unfair labor practice in refusing to bargain with the Union (A. 212). See *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 610-611.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C 151, *et seq.*) are as follows:

SEC. 2 * * *

(11) the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 3 * * *

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not,

unless specifically ordered by the Board, operate as a stay of any action by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed. * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for col-

lective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(e) is based in whole or in part upon facts certified following an investigation pursuant to subsection (e) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing

before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon

the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the Board Rules and Regulations (29 C.F.R. 102.63, *et seq.*) are as follows:

SEC. 102.63. *Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.*—(a) After a petition has been filed under section 102.61(a), (b), or (c), if no agreement such as that provided in section 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the regional director shall prepare and cause to be served on the parties and on any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under section 102.61 (d) or (e), the regional director shall conduct

an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served on the parties and on any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this subsection (b) shall be in conformance with sections 102.64 through 102.68 whenever applicable, *except* where the unit or certification involved arises out of an agreement as provided in section 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by section 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under section 102.67, except where an agreement under section 102.62(a) is involved.

SEC. 102.64 *Conduct of hearing.*—(a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

* * * * *

SEC. 102.67. Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.—(a) The regional director may proceed, either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies thereof shall be served simultaneously on all other parties to the proceeding. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be received not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on

the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board eight copies of a statement in opposition thereto, which shall be duplicated and served in accordance with the requirements of subsection (b) of this section; except that if personal service of the request for review is made upon the Board, 10 days will be allowed. However, 3 days will not be added to either of the aforesaid prescribed periods as provided in section 102.114. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue

which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

* * * * *

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

* * * * *

(j) Upon transfer of the case to Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director, and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

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E. ROBERT SEEVER, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1970

—
No. 370
—

MAGNESIUM CASTING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT.

—
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
—

PETITION FOR RECONSIDERATION
OF DECISION OF COURT DELIVERED ON
FEBRUARY 23, 1971

—
LOUIS CHANDLER
Attorney for Petitioner
Magnesium Casting Company
79 Milk Street
Boston, Massachusetts

TABLE OF CONTENTS

	Page
Issue	1
Background	2
Argument	2
A. Legislative History	3
B. The administrative history of this case discloses that the petitioner has been deprived of the pro- cedural due process guaranteed by statute to an accused in an unfair labor practice proceeding	8
(a) The application of the Board's "Rule Against Relitigation" deprived petitioner of the ad- ministrative rights and protection guaranteed to par- ties accused of unfair labor practices by the Adminis- trative Procedure Act and by the Labor Management Relations Act	8
(b) There is a basic distinction between represen- tation cases and unfair practice cases	10
(c) The combined effect of the Board's limited standard of review in representation cases and appli- cation of its "Rule Against Relitigation" in this unfair labor practice case has deprived petitioner of its statu- tory right to the mandatory, plenary, de novo review which the Board is required to grant to a party accused of an unfair labor practice	12
Conclusion	14

TABLE OF CITATIONS

Cases

<i>Amco Elec. v. NLRB</i> , 358 F.2d 370 (9th Cir. 1966)	11
<i>Botany Worsted Mills v. United States</i> , 278 U.S. 282 (1929)	6
<i>Cudahy Packing Co. v. Holland</i> , 315 U.S. 357 (1942)	6

Table of Contents

	Page
<i>International Woodworkers of America v. NLRB</i> , 262 F.2d 233 (D.C. Cir. 1958)	13
<i>Kroblin Refrigerated Express, Inc. v. United States</i> , 197 F.Supp. 39 (N.D. Iowa 1961)	12
<i>NLRB v. Jackson Maintenance Corp.</i> , 283 F.2d 569 (2nd Cir. 1960)	13
<i>NLRB v. Winn-Dixie Greenville, Inc.</i> , 379 F.2d 958 (4th Cir.)	13
<i>Ramspeck v. Federal Trial Examiners Conference</i> , 345 U.S. 128, 73 S.Ct. 570 (1953)	10
<i>Snow v. NLRB</i> , 308 F.2d 687 (9th Cir. 1962)	13
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474, 71 S.Ct. 456 (1951)	13
<i>Wellington Mill Dir. West Point Mfg. Co. v. NLRB</i> , 330 F.2d 579 (4th Cir.) cert. denied, 379 U.S. 882, 85 S.Ct. 144 (1964)	10
<i>Statutes</i>	
<i>Administrative Procedure Act</i> , 5 U.S.C. §551 et seq	8
§554(A)(5)	8
§556(B)	9
§556(D)	8
§556(E)	11
§557(B)	9, 11
§557(C)	9, 11
<i>National Labor Relations Act</i> , 29 U.S.C. §151 et seq	8
§3(b)	2, 8
§3(d)	12
§4(a)	12
§9	3
§9(e)(1)	10
§10	3, 6
§10(b)	7, 8
§10(c)	9, 10, 12, 13

Table of Contents

iii

	Page
<i>Miscellaneous</i>	
Board's Rules and Regulations, Series 8 as amended:	
Part 102, Subpart B	7
Subpart C	7
29 C.F.R.	
102.42	9
102.48	13
102.66	11
102.67(c)	12
Statements of Procedure, Series 8 as amended,	
Part 101, Subpart B	7
Subpart C	2, 7
Section 101.21(b)	2
2 N.L.R.B. Legislative History of the Labor Management and Disclosure Act of 1959 (1959)	
1327(2)	5
1465(2)(3)	5
1714(3)	4
1722(3)	4
1749(3)	5
1750(1)	5
1811(3)	4
1830(2)	4
1856(2)	3, 5, 6

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PETITION FOR RECONSIDERATION
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FEBRUARY 23, 1971

Issue

On the basis that the opinion of the Court failed to consider certain arguments argued by the petitioner, is the Petitioner entitled to reconsideration of the decision of the

Honorable Court that the National Labor Relations Board is not required to give at least plenary review to the regional director's representation determination before issuing an unfair labor practice order based on that determination?

Background

A Regional Board employee conducted an investigation which took the form of a hearing not subject to the rules of evidence pursuant to the Statements of Procedure of the Board.¹

The hearing officer transmitted an analysis of the issues and evidence but made no recommendations.²

The regional director made findings of credibility without having observed the witnesses. (A. 110)

Argument

The court has premised its opinion on its understanding of the legislative intent permitting the Board to delegate its authority in representation cases to regional directors under section 3(b) of the Act.³ The opinion of the

¹ Statements of Procedure, Series 8, AS AMENDED, Part 101 Subpart C —

Representation Cases, Section 101.20 (C) which states in relevant part:

"The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case."

² Statements of Procedure, Section 101.21 (b).

³ Section 3 b of the Act, 29 U.S.C. § 158 (b):

"... The Board is also authorized to delegate its regional directors its powers under Section 9 to determine the unit. . . ."

court indicates that its understanding of the legislative purpose is less than certain when it states —

"or perhaps Congress was primarily motivated by a desire to lighten the Board's workload." (page 5 of Court opinion in case at bar)

These are two areas of concern that warrant reconsideration.

The first involves the reference by the court to an excerpt from Senator Goldwater's statement as to the legislative history.⁴

The second involves the failure of the court to require the Board to conform with the requirements of the Act to separate and different evidentiary standards distinguishing representation cases from unfair practice cases.⁵

A. LEGISLATIVE HISTORY

It is submitted that the court rather than citing the Board's excerpt from Senator Goldwater's explanation should have based its opinion on the broad range of legislative discussions referred in the brief of the petitioner⁶ which support its contention that the delegation of representation matters to the regional director did not carry with it the right of the regional director to make a finding which would be final in an unfair practice case.

Congressman Griffin, not only a member of the confer-

⁴ II Legislative History, Labor-Management Reporting and Disclosure Act of 1959 (GPO 1959), p. 1856.

" The regional director can exercise no authority in *representation cases* which is greater or not the same as the statutory powers of the Board *with respect to such cases*. "

⁵ Sections 9 and 10 of the National Labor Relations Act as amended, 61 Stat. 136, 73, Stat. 519, 29, U.S.C. § 153.

⁶ Brief of Petitioner, Pages 22, 23.

ence committee, but also a co-sponsor of the bill stated in the Conference Report:

"Section 701(b) authorizes the National Labor Relations Board to delegate to its regional directors certain powers *under section 9 pertaining to representation cases. . . . It shou'd be emphasized that the section relates only to representation matters. . . .*"⁷

Congressman Barden, one of the conferees, stated:

"The conferees adopted a provision that there should be some consideration given to *expediting the handling of some of the representation cases. . . .*"⁸

He also stated:

"The Board may delegate to the 23 regional directors full authority to handle and conduct these election cases . . . thus enabling the Board to expedite its remaining cases. . . ."^{8a}

Congressman Udall stated:

"(3b) will enable the NLRB to handle more cases and to handle them more expeditiously, by decentralizing its supervision of elections. . . ."⁹

Congressman Morse stated:

"The possibility of overloading the Board is significantly countered by permitting regional directors to

⁷ 2 NLRB Legislative History 1811 (3).

⁸ 2 NLRB Legislative History 1714 (3).

^{8a} 2 NLRB Legislative History 1830 (2).

⁹ 2 NLRB Legislative History 1722 (3).

decide representation cases. . . ." (as distinguished from unfair practice cases.¹⁰

Congressman Smith discussed the concern that none of the Board's functions in unfair practice cases be given to the regional director.¹¹

Congressman Kearns who introduced the original language of the delegation of authority which was ultimately adopted as section 3(b) stated:

" . . . The Board is authorized to delegate to its regional directors the *processing of representation cases*. Such cases account for more than 50 per cent of the Board's workload. . . . This change of procedure will materially decrease *the time spent in processing representation cases*. . . ." ¹²

Senator Douglas stated:

" . . . (Under 3(b)) the Board is authorized to delegate its regional directors *its powers under Section 9* . . . " (not under Section 10 dealing with unfair practices).¹³

Thus, it is apparent that the Congressional debates preceding the adoption of 3(b) revealed a purpose to expedite only representation cases which are non-adversary by statute; the resolution of unfair practice cases was reserved exclusively to the Board because of the adversary nature of such cases.

It is significant that the Board, when it directed the attention of the court in argument to the statement by Sen-

¹⁰ 2 NLRB Legislative History 1327 (2).

¹¹ 2 NLRB Legislative History 1465 (2) (3).

¹² 2 NLRB Legislative History 1749 (3) - 1750 (1).

¹³ 2 NLRB Legislative History 1856 (2).

ator Goldwater in explanation of legislative intent, failed to include in the quote — and only the quote by the Board was referred to in the opinion of the court — the following comment by the Senator when he subsequently explained what he meant by expediting “disposition of cases”:

The Senator stated that he had in mind

“. . . contested representation cases. . . .” (i.e. not unfair practice cases).¹⁴

The decision by the Board and in the opinion of the court of this essential portion of the Senator’s explanation is not insignificant.

Thus, there is no legislative intent indicated or stated, directly or indirectly, to affect the absolute duty which it had previously imposed on the Board in Section 10 to review the disposition of unfair practice cases.

“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” (*Botany Worsted Mills v. United States*, 278 U.S. 282 (1929) at 289.)

The delegation of Section 9 power did not carry with it the right to delegate the Section 10 responsibility of the Board. See *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942).

Under Section 10 of the Act the Board is required to process unfair practice cases on a different basis than representation cases which arise under Section 9 of the Act. The delegation to the regional director of representation matters in fact was intended to lighten the *representation* case load of the Board so it could properly process *unfair*

¹⁴ 2 NLRB Legislative History 1856 (2).

practice cases. The Board's Statements of Procedure establish differing methods for handling the two types of cases.¹⁵

So, too, the Rules and Regulations of the Board differ as to the two types of cases.¹⁶

No reference is made in the opinion of the court to help hurdle the ukase in Section 10(b) of the Act which states explicitly as to unfair practice charges:

"The person so complained of shall have the right to . . . give testimony. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States under the rules of civil procedure. . . ."

Many representation cases are concluded with the election and the certification of results. In so far as this has been accomplished, the legislative purpose has been effectively achieved. But in those cases which subsequently grow into adversary unfair practice cases, it is submitted that there

¹⁵ Statements of Procedure, Series 8, AS AMENDED — Part 101
Subpart B — Unfair Practice cases under Section 10.

Subpart C — Representation cases under Section 9.

¹⁶ Rules and Regulations of the NLRB, Series 8, AS AMENDED — Part 102

Subpart B — Procedure under Section 10 (as to) Unfair Practice cases

"Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

Subpart C — Procedure under Section 9(c) . . . concerning Representation.

". . . Sec. 102.66. . . . The rules of evidence prevailing in courts of law or equity shall not be controlling. . . ."
(emphasis supplied).

is no scintilla of legislative history, nor was there the slightest indication in congressional debate, that implicit in the 3(b) delegation of Section 9(c) representation election cases was an intent to amend Section 10(b) or 10(c). If 10(b) were to be applied in the manner suggested by the Board—presumably with court approval although the opinion of the court makes no mention of 10(b)—then parties who anticipate evidentiary credibility issues may be reluctant to present evidence at a hearing to any person but the one who under the Board rules ultimately could make the credibility finding, i.e., the regional director, which would make for inordinately large case backlogs.

B. THE ADMINISTRATIVE HISTORY OF THIS CASE DISCLOSES THAT THE PETITIONER HAS BEEN DEPRIVED OF THE PROCEDURAL DUE PROCESS GUARANTEED BY STATUTE TO AN ACCUSED IN AN UNFAIR LABOR PRACTICE PROCEEDING.

(a) *The application of the Board's "Rule Against Relitigation" deprived petitioner of the administrative rights and protections guaranteed to parties accused of unfair labor practices by the Administrative Procedure Act and by the Labor Management Relations Act.*

Although representation proceedings are expressly exempted from the protections of the Administrative Procedure Act (herein called the "APA" by Section 5(A) thereof) 5 U.S.C.A. § 554(a)(5), it is clear beyond any doubt that unfair labor practice proceedings are within the coverage of that Act. This APA coverage includes the following procedural rights, all of which have been denied petitioner by the Board's application of its rule against relitigation:

- (1) Right to a hearing at which "the proponent of a rule or order [has] . . . the burden of proof." Section 7(e) of APA, 5 U.S.C.A. § 556 (D);

- (2) Opportunity, prior to decision, to submit for the consideration of the officers participating in such decision proposed findings and conclusions and supporting reasons for such proposed findings or conclusions. Section 8(b) of APA, 5 U.S.C.A. § 557 (C);
- (3) Right to have the record show the ruling upon each such finding or conclusion presented. *Ibid.*;
- (4) Right to have presiding at the taking of evidence either the agency, one or more members of the body which comprises the agency, or one or more independent hearing examiners appointed as provided in Section 11 of the APA, 5 U.S.C.A. § 556(B);
- (5) Right to have the same officer who presided at the reception of evidence make the recommended or initial decision. Section 5(e) of APA, 5 U.S.C.A. § 557(B);
- (6) Assurance that the deciding officer shall not consult with any person on any fact in issue unless upon notice and opportunity for all parties to participate. *Ibid.*

In addition, it should be emphasized that the Act and the rules and regulations issued pursuant thereto duplicate many of the APA safeguards listed above, *e.g.*, (i) Section 10(c) of the Act, 29 U.S.C. § 160(c), places the burden upon the General Counsel to prove the unfair labor practice charge by "the preponderance of the testimony taken"; (ii) NLRB Rules and Regulations § 102.42, 29 C.F.R. § 102.42 gives any party the right to file proposed findings and conclusions, or both, with the trial examiner before the latter's decision is handed down; (iii) the statutory scheme contemplates that the same officer who hears the evidence in the complaint case, *i.e.*, the trial examiner, will also make the recommended decision.

These enumerated rights do not exist in a vacuum, but

are part and parcel of specific Congressional policy decisions made in response to the problems posed by the emergence of federal administrative agencies as the "fourth branch" of the federal government. They exist in order to insure that the rights of private litigants will not be sacrificed in favor of the need for the expeditious determination of individual cases.¹⁷

(b) *There is a basic distinction between representation cases and unfair practice cases.*

(1) There is no burden whatsoever upon the Board or its agents in representation proceedings. The only "standard" being whether "a question of representation exists." Section 9(e)(1) of NLRA, 29 U.S.C. § 159(e)(1). In the instant case, this distinction has resulted, in effect, in the Company's being required to prove that the assistant foremen in question are not employees. Certainly this is a far cry from the proposition that the burden in the complaint case is upon the General Counsel to prove unfair labor practice charges by sufficient evidence "and is not upon the employer to disprove them" *Wellington Mill Div. West Point Mfg. Co. v. NLRB*, 330 F. 2d 579, 585 (4th Cir.) cert. denied, 379 U.S. 882, 85 S. Ct. 144 (1964). Nowhere in its "Decision and Order" in the unfair labor practice proceeding in this case does the Board make any finding that the General Counsel has sustained his burden of proof in accordance with the Section 10(e) standard.

(2) The fact that petitioner has no way of ascertaining how the credibility resolutions were made upon the partially conflicting evidence introduced at the representation hearing is closely related to its being subjected to the provisions

¹⁷ For a discussion of the history and policies underlying the passage of the APA, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 73 S. Ct. 570 (1953).

of NLRB Rules and Regulations § 102.66(f), 29 C.F.R. § 102.66(f), which authorizes the hearing officer in the representation proceeding to "submit an analysis of the record to the regional director . . ." — an "analysis" which does not become part of the official record in either the representation proceeding or the complaint proceeding. Petitioner has no way of determining whether such an analysis was made, the contents thereof, and/or whether the Acting Regional Director agreed or disagreed with any credibility resolutions made by the hearing officer.¹⁸ Petitioner has never had an opportunity to respond or except to the findings contained in this inscrutable "analysis". This procedure, under which such *ex parte* communications are authorized, is contrary to the provisions of Section 5(c) of the APA, 5 U.S.C.A. § 557(b) and of Section 7(d) of the APA, 5 U.S.C.A. § 556(e), which provides that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the *exclusive record for decision . . .*" (Emphasis added).

(3) Although parties to representation proceedings are authorized by the Board's Rules and Regulations to file a post-hearing brief to the Regional Director prior to the latter's decision, their position at this stage is not unlike the game of "blind man's bluff," since they have no way of knowing what the basis for that decision will be. Moreover, the Regional Director's decision, when issued, is expressly made "final" subject to the severely limited possibility that the Board may grant review. Accordingly, where, as here, such review is denied and, subsequently, in the unfair labor practice proceeding, the rule against relitigation is applied by the Board, petitioner has been deprived of the right guaranteed by Section 8(b) of the APA, 5 U.S.C.A.

¹⁸ On the potential importance of credibility resolutions by the one who actually hears the evidence in general, see e.g., *Amco Elec. v. NLRB*, 358 F. 2d 370 (9th Cir. 1966).

§ 557(c) and Section 10(e) of the NLRA, 29 U.S.C. § 160(e) to be fully informed as to the issues and proposed grounds of decision and to be heard upon those issues and grounds prior to any final decision. *Kroblin Refrigerated Express, Inc. v. United States*, 197 F. Supp. 39, 45 (N. D. Iowa 1961) (3 Judge District Court.)

(4) Whereas the trial examiner who conducts the unfair labor practice hearing is an independent "hearing examiner" within the meaning of the APA (the difference in nomenclature being merely historical), whose appointment by the Board under Section 4(a) of the NLRA, 29 U.S.C. § 154(a), is subject to the Civil Service Commission's certifying his eligibility for a hearing examiner position, the "hearing officer" in the representation proceeding is subject to the direct control of the General Counsel, the prosecuting arm of the Board. In addition to the general supervision outlined by the Act, Section 3(d) of NLRA, 29 U.S.C. § 153(d), the General Counsel has "full and final authority on behalf of the Agency over the selection, retention, transfer, promotion, demotion, discipline [and] discharge . . ." of all categories of Board employees who are qualified to sit as hearing officers (i.e., chief law officers, field examiners and field attorneys).

(c) *The combined effect of the Board's limited standard of review in representation cases and application of its "Rule Against Relitigation" in this unfair labor practice case has deprived petitioner of its statutory right to the mandatory, plenary, de novo review which the Board is required to grant to a party accused of an unfair labor practice.*

The Board's limited certiorari type of standard for reviewing a representation decision of a regional director is set forth in its Rules and Regulations, § 102.67(e), 29 C.F.R. § 102.67(e).

In direct contrast to that limited right of review stands the procedure prescribed for the Board's review of a trial examiner's unfair labor practice decision. The latter officer's decision is not final but is merely a "proposal" or "recommendation," 29 U.S.C. § 160(c), which only becomes final "in the event no timely or proper exceptions are filed" thereto, NLRB Rules and Regulations § 102.48, 29 C.F.R. § 102.48.

Petitioner has been prejudiced in this unfair labor practice proceeding, because it has never had the opportunity to have the Board "reverse" a trial examiner, or even the Region Director, based upon its own differing view of the preponderance of the evidence bearing on the "supervisor" versus "employee" issue. Cases are legion in which the Board, for this exact reason, has refused to adopt the findings and conclusions of the trial examiner.¹⁹ The resulting prejudice to petitioner is not obviated by its right to an appellate court review of the Board's "determination," since that right is limited by the substantial evidence rule. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 475 (1951); 10 *NLRB v. Winn-Dixie Greenville, Inc.*, 379 F.2d 958 (4th Cir.)

To summarize, it is impossible for the Board to deny review altogether, as it did in the representation proceeding, to apply its rule against relitigation as it did in the subsequent complaint proceeding, and, at the same time to have afforded petitioner the mandatory, plenary, *de novo* review (to which it was entitled by Section 10(e) of the Act) of the factual findings upon which the bargaining order was based.

¹⁹ See e.g., *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962); *NLRB v. Jackson Maintenance Corp.*, 283 F. 2d 569 (2d Cir. 1960) (Board reversed examiner's credibility resolution); *International Woodworkers of America v. NLRB*, 262 F. 2d 233, 234 (D. C. Cir. 1958) (Board's disagreement with examiner "based on the inferences drawn from the testimony.")

It is clear that the effect of the Board's refusal to review the Acting Regional Director's adverse representation decision and its subsequent application, in the unfair labor practice proceeding, of the rule against relitigation, was a retroactive, unlawful subdelegation to its Acting Regional Director of the Board's decision-making obligation in the unfair labor practice proceeding.

Conclusion

In view of the principles of law herein discussed and the authorities cited, the court should reconsider its decision and grant a rehearing and the Board's decision holding the Company guilty of an unfair labor practice should be set aside, and enforcement of its bargaining order refused or it should remand the case to the Board for further proceedings with appropriate directions.

Respectfully submitted,

LOUIS CHANDLER
Attorney for Petitioner
Magnesium Casting Company
79 Milk Street
Boston, Massachusetts

Dated: March 17, 1971

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MAGNESIUM CASTING CO. v. NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 370. Argued January 18-19, 1971—Decided February 23, 1971

Following a unit determination hearing, the National Labor Relations Board (NLRB) regional director concluded that three individuals were employees rather than supervisors and thus includable in the proposed bargaining unit at petitioner company's plant. The NLRB denied petitioner's request for review. Following an election, the regional director certified the union as the exclusive bargaining representative. Subsequently, the NLRB upheld a finding that petitioner's refusal to bargain constituted an unfair labor practice. Petitioner moved for reconsideration on the ground that the NLRB was required to give plenary review to the regional director's representation determination before issuing an unfair labor practice order based on that determination. The motion was denied and the Court of Appeals enforced the NLRB's order. *Held:* Under § 3 (b) of the National Labor Relations Act the NLRB is permitted to delegate to the regional director its authority to determine the appropriate bargaining unit, and plenary review by the NLRB of such determination is not mandatory. Pp. 4-6.

427 F. 2d 114, affirmed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 370.—OCTOBER TERM, 1970

Magnesium Casting Company,
Petitioner,
v.
National Labor Relations
Board. } On Writ of Certiorari
to the United States
Court of Appeals for
the First Circuit.

[February 23, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 3 (b) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 153, authorizes the Board to delegate to its regional directors the power to determine the unit appropriate for collective bargaining.¹ The Board accordingly adopted rules delegating to its regional directors its powers to determine representation issues and defining the conditions

¹ Sec. 3 (b) provides in relevant part:

"The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director. . . ."

when the Board will review the determination of a regional director.²

On filing of a representation petition, § 9 (c)(1) provides that a hearing shall be held to determine if a question of representation exists and if so the appropriate bargaining unit. If an election is directed and the union prevails, it is certified as the employee's bargaining representative. An employer who contests the election, including the unit determination, can only obtain court review under § 10 after an unfair labor practice charge has been made against him by the Board for

² The Rules are contained in 29 CFR § 102.67 App. § 102.67 (e)(d) and (f) state in relevant part:

"(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

"(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

"(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

"(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

"(4) That there are compelling reasons for reconsideration of an important Board rule or policy. . . .

"(d) . . . With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

"(f) . . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

refusing to bargain collectively "with the representatives of his employees" as provided in § 8 (a)(5).

In that review, however, the determination of the bargaining unit by the regional director need not be reviewed by the Board. Whether the Board reviews the initial decision on the merits, see *Pittsburgh Plate Glass Co. v. NLRB*, 313 U. S. 146, 162, or the employer fails to request review of the action of the regional director, or the Board denies a request for review, the Board has discretion to reopen the issue where newly discovered noncumulative evidence is available.³

The United Steelworkers filed a petition requesting a representation election among the production and maintenance employees at petitioner's Hyde Park, Massachusetts, plant. The regional director provided a hearing and the essential issues tendered concerned four individuals classified as "assistant foremen." The question was whether they were employees and properly within the unit or supervisors as defined in § 2 (11) of the Act and therefore excluded. The regional director found that three were employees and ordered an election in a unit consisting of all the employees, including the three.

Petitioner filed a request with the Board to review the decision of the regional director that the three men in question were employees, contending that such determination was clearly erroneous. The Board denied petitioner's request for review and an election was held. Thereafter the regional director certified the union as the exclusive bargaining representative of the employees. When petitioner refused to bargain, the union filed an unfair labor practice with the Board. The trial examiner found for the union and the Board affirmed. 175 N. L. R. B. No. 68.

Petitioner moved for reconsideration claiming the Board must review the regional director's representation

³ See Rules, *supra*, n. 2.

determination before issuing an unfair labor practice order based on it. Petitioner's reliance was on *Pepsi-Cola Co. v. NLRB*, 409 F. 2d 676, decided by the Second Circuit Court of Appeals. The Board denied that motion, noting its disagreement with the *Pepsi-Cola* case.

The Court of Appeals enforced the Board's order,⁴ — F. 2d —, thus creating the conflict among the circuits which led us to grant the petition for certiorari. 400 U. S. —.

Petitioner argues that plenary review by the Board of the regional director's unit determination is necessary at some point. Historically, the representation issue once fully litigated in the representation proceeding could not be relitigated in an unfair labor practice proceeding. We so held in *Pittsburgh Plate Glass Co. v. NLRB*, *supra*. That case, of course, was decided when the determination of the appropriate unit was made by the Board itself. In 1959, § 3 (b) was added. Senator Goldwater, a member of the Conference Committee explained its purpose:⁵

"[Section 3 (b)] is a new provision, not in either the House or Senate bills, designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.

"Under this provision, the regional director can exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. In the handling of such cases, the regional directors are required to follow the lawful rules, regulations, procedures, and precedents of the Board and to act in all respects as the Board itself would act. . . .

⁴ The Tenth Circuit is in accord with the First. See *Meyer Dairy, Inc. v. NLRB*, 429 F. 2d 697, 699-700.

⁵ II Legislative History, Labor-Management Reporting and Disclosure Act of 1959 (GPO 1959), p. 1856.

"This authority to delegate to the regional director is designed, as indicated, to speed the work of the Board . . .".

We take this statement to reflect the considered judgment of Congress that the regional directors have an expertise concerning unit determinations. Or perhaps Congress was primarily motivated by a desire to lighten the Board's workload and speed up its processes. Its recent report⁶ shows that in fiscal year 1969, a total of 1,999 formal representation decisions were issued either directing elections or dismissing election petitions; 1,872 of these were rendered by regional directors, and 127 by the Board (100 on direct transfer from the regional directors for initial decision and 27 on grant of a request for review of the regional director's decision).

But for the 1959 amendment the Board would have decided all of those cases.

Whatever the reason for the delegation, Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.

The fact that Congress in 1961 rejected a reorganization plan which would have delegated decisionmaking power in unfair labor practice cases in the hands of trial examiners subject to discretionary Board review⁷ has no bearing on the present problem. The choices Congress may make in deciding what delegation of authority is appropriate do not in the present context raise any semblance of a substantial question. For it is unmistakably plain here that by § 3 (b) Congress did allow the Board to make a delegation of its authority over determination of the appropriate bargaining unit to the regional director.

⁶ 34th Annual Report, Table 3B, 201 (GPO 1970).

⁷ 107 Cong. Rec. 10223, 12905-12932.

The Board's Rules⁸ make clear that the regional director is required to follow the same rules as the Board respecting fact finding.⁹ The regional director's determination if adopted by the trial examiner in the unfair labor practice proceeding accompanies the case both to the Board¹⁰ and to the Court of Appeals.¹¹ In the present case the Court of Appeals concluded that the Board's order was supported "by substantial evidence."¹²

Congress has required no greater showing than that.

Affirmed.

⁸ See Rules, *supra*, n. 2.

⁹ 29 CFR § 102.67 (b).

¹⁰ 29 CFR § 102.45 (a).

¹¹ 29 CFR § 101.14.

¹² There is no different standard of review prescribed by the Administrative Procedure Act. See *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 487.